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THE HISTORY OF THE JUDICIAL REVIEW OF ADMINISTRATIVE POWER AND THE FUTURE OF REGULATORY GOVERNANCE

JOHN J. COUGHLIN*

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In two recent immigration cases, the U.S. Supreme Court upheld the crucial role served by the judicial review of administrative power in democratic society.[1] *Immigration and Naturalization Service v. St. Cyr* involved the habeas corpus petition of a resident alien whom the Immigration and Naturalization Service ("INS") intended to deport. The habeas petition sought review of the Attorney General's opinion that Congress had withdrawn the administrative discretion to waive deportation of resident aliens who had plead guilty to an aggravated felony.[2] The Supreme Court held that the INS had not overcome "the

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1. INS v. St. Cyr, 121 S. Ct. 2271 (2001); Zadvydas v. Davis, 121 S. Ct. 2491 (2001).

2. *St. Cyr*, 121 S. Ct. at 2276-77. Section 212(c) of the Immigration and Nationality Act of 1952 was interpreted to authorize a large class of resident aliens with at least seven consecutive years of U.S. domicile to apply for discretionary waiver of deportation. The Antiterrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 amended the Immigration and Nationality Act to identify a large set of offenses for which conviction would preclude the discre-

strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction."[3] In *Zadvydas v. Davis*,[4] the Supreme Court ruled in favor of two resident aliens, who having been convicted of felonies and fulfilled prison terms, were then ordered deported and subsequently detained indefinitely.[5] The Court refused to defer to the Executive Branch and found that Congress had not granted the Attorney General the discretion to detain the petitioners beyond a reasonable time period of six months.[6] Pursuant to the federal habeas statute, the Court held that habeas jurisdiction was available given the serious constitutional issue raised by indefinite civil detention.[7] Although both *St. Cyr* and *Zadvydas* concerned federal habeas jurisdiction as a distinct form of judicial review, the technically more narrow role played by habeas jurisdiction points to the broader significance of the judicial review of administrative action in protecting fundamental constitutional freedoms.[8]

During the twentieth century, administrative governance emerged as a characteristic of the modern democracy.[9] With the ad-

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tionary authority of the Attorney General to waive deportation. Prior to enactment of the 1996 statutes, St. Cyr entered into a plea agreement pursuant to which he would have been eligible for a waiver of deportation. *Id.* at 2273. His removal proceeding was commenced after the enactment of the 1996 statutes, and the Attorney General interpreted the 1996 statutes to withdraw authority to waive deportation. *Id.* at 2276-77. The Supreme Court held that the 1996 statutes did not (1) deprive the federal courts of jurisdiction to review the St. Cyr's habeas petition and (2) apply retroactively to the plea agreement. *Id.*

3. *Id.* at 2278.

4. 121 S. Ct. 2491 (2001).

5. *Id.* at 2495-97 (describing the specific factual backgrounds of the two petitioners who were both detained beyond the ninety-day statutory period because no nations were willing to accept the deportees).

6. *Id.* at 2498-2504.

7. *Id.* at 2497-98. The petitioners were not seeking review of the Attorney General's exercise of discretion. Rather, they challenged the extent of the Attorney General's authority to detain them indefinitely following civil deportation proceedings in violation of the constitutional due process guarantee. *Id.*

8. *St. Cyr*, 121 S. Ct. at 2283-87 (discussing the distinction between habeas jurisdiction and the more general jurisdiction of the federal courts to review administrative action).

9. *See* Fed. Trade Comm'n v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("The rise of administrative bodies probably has been the most significant legal trend of the last century . . . . They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories . . . ."). *See also* James Q. Wilson, *The Rise of the Bureaucratic State*, 41 THE PUB. INT. 77 (1975); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992) (highlighting that the administrative government offers the "best hope of implementing civic republicanism's call for deliberative decision making informed by the values of the entire polity"); William K. Shirey, *Accountability and Influence After Chevron: Is the Regulatory State Consistent with Our Constitutional Heritage?*, 86 GEO. L.J.

vent of this century, the once absolute sovereignty of the nation state has been challenged by the idea of "global regulatory governance."[10] Concomitant with these trends, the traditional understanding of administrative law as involving judicial review to resolve disputes between private persons and public officials has been called into question.[11] The administrative state is now characterized by agency rule making with an emphasis on the implementation of public policy rather than the resolution of individual disputes.[12] Enthusiasm for national and global regulatory regimes might be tempered by recalling the words of Kenneth Culp Davis that rules per se "cannot cope with the complexities of modern government and of modern justice."[13] The diverse array of government endeavors to safeguard the environment, assist the disabled, ensure medical care for the needy, afford adequate housing for all citizens, manage social security, educate the young, organize immigration, facilitate electronic communications, protect individual privacy, grant licenses, and regulate diverse fields of indus-

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2735, 2736, 2772 (1998) (emphasizing that the rise of the regulatory state needs to be reconciled with the framework of U.S. Constitution); David B. Spence & Frank B. Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 141-42 (2000) (making a public choice argument in favor of the administrative state).

10. *See* Kanishka Jayasuriya, *Globilization, Law, and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance*, 6 IND. J. GLOBAL LEGAL STUD. 425 (1999); Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1, 8 (1993); Alfred C. Aman, Jr., *Administrative Law in the United States—Past, Present and Future*, 16 QUEENS L.J. 179, 201-03 (1991). *Cf.* Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rule making*, 85 VA. L. REV. 1243 (1999); Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View From Liberal Democratic Theory*, 88 CAL. L. REV. 395, 495 (2000) ("[A]t least for the foreseeable future, a global regime of semiautonomous liberal nation-states represents the best means for fostering liberal rights and institutions.").

11. CHRISTOPHER EDLEY, ADMINISTRATIVE LAW, RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 213-60 (1990). In his radical critique of American administrative justice, Edley calls for a fundamental rethinking of the way in which the three branches of government interact with administrative agencies. Arguing that the "trichotomy of decision making" no longer serves the purposes of sound governance, he proffers that these branches, and in particular the judiciary, should enter into a direct partnership with administrative authority. *Id. See also* Cross, *supra* note 10, at 1244 (calling for the abolition of judicial review of agency rule making).

12. *See* E. Donald Elliot, *The Dis-Integration of Administrative Law: A Comment on Shapiro*, 92 YALE L.J. 1523 (1983). *But see* Jonathyn T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 12-18, 53-66 (2000) (emphasizing the independent role of the judiciary in the administrative state).

13. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 25 (1969).

try, *inter alia*, require broad delegations of government power to administrative agencies with specialized expertise.[14]

Traditionally, judicial review has afforded an important check on the exercise of administrative power. First, judicial review functions to protect the legislative intent behind the statutory authorization of the exercise of administrative power. Pursuant to the conventional model, an administrative agency exercises restricted legislative and judicial functions under judicial scrutiny to insure compliance with congressional intent.[15] Judicial review insures that "a congressional delegation of power . . . must be accompanied by discernible standards, so that the delegatee's action can be measured for its fidelity to the legislative will."[16] Additionally, the opportunity for judicial review of administrative action corrects and prevents abuses of government power exercised by non-elected bureaucrats and administrators such as corruption and bribery,[17] incompetence,[18] inaction,[19] bias and preju-

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14. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 3 (1965) (identifying the subject of administrative law as "the relation between the courts and all officers, 'executive' or 'administrative,' administering powers delegated to them by the legislature"); KENNETH CULP DAVIS, ADMINISTRATIVE LAW § 1.1 (2d ed. 1978) (describing administrative law as "the law that governs those who administer any part of governmental activities"); and JACOB A. STEIN, GLENN A. MITCHELL & BASIL J. MEZINES, 1 ADMINISTRATIVE LAW § 1.01 (1993) (defining administrative law as "the powers, functions and procedures of the various administrative agencies and the methods provided for judicial review of their decisions").

15. *See* Yakus v. United States, 321 U.S. 414, 424 (1944). In *Yakus*, the Court sated:

> [t]he Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.

Id.

16. Eastlake v. Forest City Enter. Inc., 426 U.S. 668, 675 (1976). *See* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (striking down a delegation of legislative power because an adequate standard was not expressed by the legislature in the statute).

17. *See, e.g.*, Electricities of N. Cal., Inc. v. Southeastern Power Admin., 774 F.2d 1262 (4th Cir. 1985) (holding that even when a lawful exercise of an agency's discretion enjoys immunity, an agency decision that is prompted by a bribe or undue influence is not immune from judicial review).

18. *See, e.g.*, Tracy v. Gleason, 379 F.2d 469 (D.C. Cir. 1967) (finding an abuse of discretion when an administrator discontinued benefits to a veteran, who was totally disabled by insanity and who failed to answer a questionnaire concerning his income).

19. *See, e.g.*, Fed. Election Comm'n v. Akins, 524 U.S. 11 (1998) (holding that voters had standing to challenge judicial review of the agency's decision not to bring an enforcement action, as the statute implicitly authorizes such action). *Cf.* Heckler v. Chaney, 470 U.S. 821 (1985) (finding that an exercise of agency discretion not to under-

dice.[20] Moreover, judicial review has functioned to insure that the common law requirements of clarity,[21] consistency,[22] and fundamental fairness[23] are observed by regulatory agencies.[24]

While the above-mentioned reasons remain valid justifications for judicial review, this article focuses on the historical development of judicial review in protecting two distinct, but interrelated, philosophical values embedded within the foundations of modern constitutional government.[25] The first involves the suspicion of government power as

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take certain enforcement actions is not subject to judicial review under the Administrative Procedure Act).

20. *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564 (1973) (affirming the holding of the federal district court that enjoined proceedings of the Alabama Board of Optometry on the ground that the Board was biased and could not provide a fair and impartial hearing); Webster v. Doe, 486 U.S. 592 (1988) (holding that the constitutional claims of a CIA employee, who was discharged for being a homosexual, were reviewable).

21. *See, e.g.*, Forsyth County v. Nationalist Movement, 505 U.S. 123 (1992) (striking down an ordinance that vested the administrator with "uncontrolled discretion" to vary the fee for assembling and parading).

22. *See, e.g.*, SEC v. Chenery Corp., 318 U.S. 80, 90 (1943) (*Chenery I*) (remanding an SEC order that disapproved a corporate reorganization plan on the ground that the SEC decision was predicated on a judge-made principle of equity and not on its "special administrative competence"); *see also* SEC v. Chenery Corp., 332 U.S. 194, 199 (1947) (*Chenery II*) (upholding the SEC's revised order that expressed with "clarity and thoroughness that admit of no doubt as to the underlying basis of its order").

23. *See, e.g.*, Brennan v. Giles & Cotting, Inc., 504 F.2d 1255 (4th Cir. 1974) (holding that when an administrative agency departs from a previously announced policy, the agency must explain the departure from the previous policy or rule that seemed dispositive of the case at hand).

24. *See generally*, STEPHEN G. BREYER, RICHARD B. STEWARD, CASS R. SUNSTEIN & MATTHEW L. SPITZER, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES 415-550 (4th ed. 1998).

25. *See, e.g.*, Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101 (1988); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986); STEPHENN SKOWRONECK, BUILDING A NEW ADMINISTRATIVE STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES 1877-1920 (1982); DAVIS, *supra* note 14, at 14-37; Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975). Of these historical studies, Rabin's is the most thorough. Three major historical periods in the development may be identified as: (1) from the inception of the Republic until the Great Depression; (2) from the New Deal through post-World War II; and (3) from the Great Society of the 1960s until the present. *See* DAVIS, *supra* note 14, at 14-37. The three historical periods do not signify rigid or precise developmental stages. For an alternative historical framework, Aman posits three distinct eras of American administrative law as follows: (1) the New Deal and the Administrative Procedure Act, 1929-1959; (2) the environmental era, 1960-1980; and (3) the global era of administrative law, starting in 1980. *See* Aman, *supra*, at 1101-1247. This article is intended neither as a comprehensive historical account nor complete overview of the various theories of administrative law. Rather, the method of the article is primarily descriptive in an attempt to retrieve the significance of the conventional account of judicial review to a democratic system of government given the unavoidable pervasiveness of the

institutionalized in the constitutional doctrine of the tripartite separation of powers.[26] The second constitutional value safeguarded by judicial review concerns the protection of personal autonomy through individual rights.[27] Based upon the historical development of American administrative law, the article recalls that judicial review, which checks the power of un-elected bureaucrats, remains critical for maintaining the suspicion of government power and protecting individual autonomy in the regulatory state.[28] This is not to suggest that autonomy and suspicion are the only or paramount values of the liberal political theory that underpins modern constitutional government. Liberal theory, for example, also places a high premium on equality and neutrality to facilitate participation in the political process.[29] Indeed, the paradox of liberal theory is that while it defines freedom in terms of personal autonomy, it depends at the same time on individual commitment to participate in the common endeavor; and, while it fosters suspicion about government power, it places confidence in the rule of law.[30] As shall be discussed, this tension may help to explain the oscillation between deference and suspicion that has characterized the history of the judicial review of administrative actions.

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regulatory regime.

26. *See* Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (arguing that "the rigid separation-of-powers compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances").

27. *See* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1202 (1982) (indicating that consistent with traditional liberal theory, the courts' function to curtail government intrusions into the realm of individual autonomy through a set of fundamental constitutional rights).

28. Richard B. Stewart, *Regulation in the Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1537-90 (1983). *Cf.* JOHN RAWLS, A THEORY OF JUSTICE 274-284 (1971) (arguing that some government regulation is necessary to maintain a just distribution of resources in society so that all individuals are permitted to compete as equals in the economic sphere); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974) (stating that certain inequalities such as intelligence and ability are innate and that the good society requires a minimum of government regulation). For a radical critique of the political and economic implications of the modern liberal state, see ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 145-90 (1975).

29. *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 18-31 (1997) (discussing "republican liberty" which means "freedom from domination"); STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 28-30 (1995) (comparing liberal theory's "negative liberty" of freedom from government interference and "positive liberty" of the individual's right of political participation and suggesting the borders between negative and positive conceptions of liberty are often unclear).

30. *Cf.* UNGER, *supra* note 28, at 63 (stating that the contradiction stems from liberal theory's inability to arrive at "a coherent understanding of the relations between rules and values in social life").

The Article traces the development of the two constitutional values of autonomy and suspicion through three historical periods: (1) the origins of judicial review as the guardian of autonomy and suspicion during the eighteenth and nineteenth centuries; (2) judicial review from the New Deal through the Administrative Procedure Act and the movement from suspicion to deference as well as the refashioning of the notion of autonomy; and (3) the administrative state from the 1960s in terms of the limits of autonomy and the oscillation between suspicion and deference. The Article thus suggests that the historical development of administrative law in the United States has bequeathed a heritage that serves to inform the increasingly pervasive reality of the national and global regulatory regimes.

I. THE ORIGINS OF JUDICIAL REVIEW AS THE GUARDIAN OF AUTONOMY AND SUSPICION

The remote origins of the development of American administrative justice may be traced to classical liberal political theory.[31] Two important characteristics of the theory are an appeal to personal autonomy as protected by individual rights and suspicion of government power as maintained through the separation of powers.[32] In the classical liberal model, the value of the state resides in large part in preserving the freedom of the autonomous individual to pursue licit private ends and to afford a neutral forum for the resolution of disputes.[33] The state assists individuals to join with others who share or advance various and disparate private goods.[34] The philosophical underpinnings of the principle may be found in Locke's political theory pursuant to which the individual enters into a social contract in which

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31. *See* Stewart & Sunstein, *supra* note 27, at 1202-03; Stewart, *supra* note 28, at 1539-46; Molot, *supra* note 12, at 12-20.

32. *See* RAWLS, *supra* note 28, at 513-20; *see also* William A. Galston, *Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory*, 40 WM. & MARY L. REV. 869, 876-905 (1999). For a discussion of the separation of powers, see David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 949 (1999) (agreeing that unconstrained delegations by Congress to administrative agencies threatens individual liberties, but arguing that in reality Congress rarely participates in unconstrained delegation); Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1500 (2000) (arguing that pursuant to the separation of powers, the judiciary plays a crucial role in protecting minority rights).

33. *See* PETTIT, *supra* note 29, at 18-31; HOLMES, *supra* note 29, at 28-30.

34. *See* JOHN LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT, AND END OF CIVIL GOVERNMENT, 330, 284 (Peter Laslett ed. 1988). *See also* Strauss, *supra* note 23, at 1500 ("In nascent liberal theory, the primary function of government thus was . . . the peaceful and authoritative resolution of existing disputes.").

he cedes freedom to the state.[35] It follows from this contractarian theory of government that it is only the consent of the individual that permits coercive control to be exercised by the government.[36]

The people's consent is institutionalized in the allocation of the power of government to the executive, legislative, and judicial branches, which function in a system of checks and balances to insure that no one branch usurps more than its right proportion of government power.[37] The U.S. Constitution recognizes no inherent administrative powers over persons and property.[38] The political realm of the

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35. *See* LOCKE, *supra* note 34, at 364-65 ("There is another *Power* in every Commonwealth, which one may call *natural*, because it is that which answers to the Power every Man naturally had before he entered into Society."). In 1776, the year that the original colonies declared independence from England, Adam Smith published the WEALTH OF NATIONS, which supplied an economic basis for the political theory. The idea of free markets unfettered by government regulation corresponded with Locke's idea that the basis of governmental power was the consent of the people. *See also* THOMAS HOBBES, LEVIATHAN 82-84 (Michael Oakeshott, ed. 1957). Espousing a more optimistic view of human nature, later philosophers, such as Jean-Jacques Rousseau and Ralph Waldo Emerson, sought to liberate the native and spontaneous goodness of the human person which, they thought, was inhibited and warped by society. Whatever their stance toward the state of nature, all of the theorists championed the triumph of individualism. *See generally* JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 4-18 (G. D. H. Cole trans. 1950); RALPH WALDO EMERSON, ESSAYS 389-401 (1951).

36. *See* JOHN STUART MILL, *On Liberty*, UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 95-96, *reprinted in* SELECTED WRITINGS OF JOHN STUART MILL (Maurice Cowling, ed. 1968) (stating "[t]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others"). This principle exerted an enormous influence on the development of the modern Anglo-American legal tradition.

37. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1755-1807 (1996). The U.S. Constitution also reflected the view that written law, consented to by individual persons, was preferable to the traditional conception of the common law. In 1787, the framers of the supreme statute designed a federal government with distinct executive, legislative, and judicial branches. They intended to fashion a document which would centralize power in a national government. Their experience during and after the War for Independence from England had demonstrated the ineffectiveness of a weak central government. At the same time, the framers were fearful of entrusting extensive power in a central authority, lest they replicate the tyrannical structure of government, which they had just overthrown. Many features of the Constitution may be understood as an attempt to reconcile these two potentially conflicting ends in one document. Rejecting the principle that identified law with the will of the sovereign, the drafters espoused the position that legitimacy of the written Constitution rested upon the consent of the people. The separation of government power into distinct executive, legislative, and judicial functions was intended to insure that no one person or part of the national government exercised unchecked power. *See* BERNARD SCHWARTZ, ADMINISTRATIVE LAW 43 (3rd ed. 1991).

38. *See* Richard B. Stewart, *supra* note 25, at 1667-72. For a discussion of recent Supreme Court administrative law decisions in terms of the separation of powers, see Oren Eisner, *Extending Chevron Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Law Making Power to the President*, 86 CORNELL L. REV. 411, 422-26 (2001).

liberal state is one in which competing conceptions of what is "good" clash.[39] This political process then results in compromises, accommodations, and settlements, which are embodied in policy set forth through the legislative power.[40] Distinct from the political realm, the rule of law is the process in which the policies generated by the political process are interpreted and applied to insure maximum equality among citizens.[41] The rule of law is, of course, institutionally embodied by a neutral judiciary.[42] An important function of the judiciary is to protect individual rights against government constraint.[43]

In the fountainhead of American constitutional law, *Marbury v. Madison*,[44] the Supreme Court held that Congress acted unconstitutionally when it conferred upon the judicial branch the authority to issue original writs of mandamus.[45] The Supreme Court struck-down the congressional statute conferring the authority on the ground that the original jurisdiction of the Court as conferred in Article III of the Constitution did not include the power to issue such writs.[46] It was the

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39. *See* RAWLS, *supra* note 28, at 399-407.

40. *See id.* at 235.

41. *See* Stewart, *supra* note 28, at 1540.

42. *Cf.* KENT GREENAWALT, LAW AND OBJECTIVITY 12-13 (1992) (describing the "rule of law" as "[t]he main criteria for judging the existence of a determinate answer is whether virtually any lawyer or other intelligent person familiar with the legal system would conclude, after careful study, that the law provides the answer").

43. *See* FRANZ NEUMANN, THE DEMOCRATIC AND THE AUTHORITARIAN STATE 163-66 (1957); RAWLS, *supra* note 28, at 239-40; *see also* Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 707 (1999) (describing constitutional democracy based upon liberal theory as "a political system with governments elected by popular majority, and with the rule of law enshrined to protect those not in the majority").

44. 5 U.S. (1 Cranch) 137 (1803).

45. *Id.* A writ of mandamus issues from a court of superior jurisdiction and commands an inferior tribunal, executive, or administrative officer, or an officer of some private or municipal corporation to perform a purely ministerial duty imposed by law.

46. The well-known facts of *Marbury* involved a private individual who sought to remedy an alleged injury as a result of the exercise of executive power. *Id.* at 137-8. The private citizen, William Marbury, brought suit against the newly appointed Secretary of State, James Madison, in order to compel Madison to deliver Marbury's commission as justice of the peace in the District of Columbia. 5 U.S. (1 Cranch) at 138. President John Adams signed Marbury's commission on the eve of the inauguration of his successor Thomas Jefferson. *Id.* President Jefferson appointed Madison as Secretary of State, and Madison refused to deliver the commission of the so-called "Adams' Midnight-Judges." In a peculiar twist of events, Chief Justice John Marshall, who authored the seminal *Marbury* opinion, had served as Madison's predecessor as Secretary of State. The issuance of Marbury's commission clearly depended on the exercise of executive power by Secretary of State Madison. From the perspective of administrative justice, if Marbury were legitimately appointed, it would seem an abuse for Madison to refuse to perform the ministerial duty of delivering the commission. Chief Justice Marshall's opinion, however, left Marbury's grievance unvindicated. Instead, the Court used the case as the opportunity to

first time that the Supreme Court invalidated legislation on the ground that it failed to comply with a provision of the Constitution, and thus, the principle of judicial review was established.[47]

Concomitant with the tripartite separation was the principle that these separate powers ought not to be delegated.[48] As Justice Story stated it: "[T]he general rule of law is, that a delegated authority cannot be delegated."[49] The nondelegation doctrine was designed to institutionalize the legislature, which would be composed of elected officials, as primarily responsible for the exercise of government power.[50] Early in the history of the American republic, the impracticability of the traditional prohibition against the delegation of judicial and legislative powers to administrative agencies became readily apparent.[51]

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solidify its power of judicial review. 2 SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE, 87-88 (1972).

47. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT 42 (1962) (discussing that the holding in *Marbury* placed the Court "in the delightful position . . . of rejecting and assuming power in a single breath"). For an analysis of the power of federal courts to engage in judicial review, see Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3-5 (1959).

48. As previously indicated, the nondelegation doctrine can be traced to the liberal political theory of John Locke, who wrote:

> The power of the *Legislative*, being derived from the People by a positive voluntary Grant and Institution, can be no other than what the positive Grant conveyed, which being only to make *Laws*, and not to make *Legislators*, the *Legislative* can have no power to transfer their Authority of making Laws, and place it in other hands.

LOCKE, *supra* note 34, at 363.

49. Shankland v. Washington, 30 U.S. (5 Pet.) 390, 393 (1831) (The maxim was "delegata potestas non potest delegari."). In the 1892 case of *Field v. Clark*, 143 U.S. 649 (1892), the Supreme Court plainly stated the rule against delegation: "That Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id* at 692.

50. *See generally* Epstein & O'Halloran, *supra* note 32, at 949; Flaherty, *supra* note 37, at 1755-1807; LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 250-56 (2nd ed. 1988); Carl Friedrich, *Separation of Powers*, 13 ENCYCLOPEDIA OF SOCIAL SCIENCES 663-66 (1934).

51. In *The Big Aurora*, 11 U.S. (7 Cranch) 382 (1813), the Supreme Court upheld a delegation by Congress to the President to lift an embargo imposed by statute on certain European trade, when the President found that the foreign nations affected by the legislation had "ceased to violate the neutral commerce of the United States." *Id.* Likewise, in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), the Court approved a congressional delegation of power to the federal courts to fashion their own rules of procedure. *See generally*, FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON ADMINISTRATIVE PROCEDURE 7-9 (1941). *Cf.* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 9-10 (1993) (arguing that delegation is used by Congress and the President to shield themselves from blame for poor public policy and that it does not serve a useful purpose); Seidenfeld, *supra* note 9, at 1525-27 (arguing that broad delegation to administrative agencies is justified by civic republicanism since the agencies "fall between the extreme of the politically overresponsive Congress and the overinsulated courts").

In 1789, the first session of the First Congress enacted two statutes to create the Customs Service under the jurisdiction of the Treasury Department.[52] Pursuant to these early federal laws, port collectors were vested with broad discretion to determine the amount of duties payable on imported and exported goods.[53] By 1810, the fourth Chief Justice of the Supreme Court characterized such a collector of duties as a "quasi-judge."[54] In 1813, the Supreme Court found it permissible for Congress to delegate legislative power by permitting administrative agencies to make rules to govern particular areas.[55] The separation of powers required that this delegation be subject to judicial review.[56]

Subsequent sessions of Congress witnessed further delegations of government power so that by the time of the Civil War federal agencies exercised a variety of rule making and adjudicatory powers.[57] The United States emerged from the Civil War poised to become a world-class industrial power.[58] The rise of big business in the post-Civil War

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52. Many members of the First Congress were also members of the various State Conventions that ratified the Constitution, which suggests that to some extent the legislators accepted a certain delegation power as consistent with the original architecture of the Constitution. Act of July 31, 1789, 1 Stat. 29 (1789); Act of Sept. 1, 1789, 1 Stat. 55 (1789).

53. This broad discretion is more enhanced than the "ministerial" discretion normally associated with executive power. The traditional remedy against an abuse of ministerial discretion remains the writ of mandamus. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (refusing to issue a writ of mandamus because underlying statute was unconstitutional); Dunlap v. Black, 128 U.S. 40, 48 (1888) (finding that the Commissioner of Pensions' action amounted to more than a mere ministerial duty and thus mandamus was not available); Carpet, Linoleum & Resilient Tile Layers, Local Union 419 v. Brown, 656 F.2d 564 (10th Cir. 1981) (holding that mandamus relief appropriate if federal administrative officials failed to comply with Davis-Bacon Act, Service Contract Act of 1965, and administrative regulations promulgated thereunder). Because it is limited to address abuses of ministerial discretion, mandamus has proved to be an ineffective tool to correct injuries suffered by individuals as a result of the broad discretion now delegated to administrators. *See* 4 DAVIS, *supra* note 14, at 156-82.

54. Scott v. Negro Ben, 10 U.S. (6 Cranch) 3, 7 (1810) (Marshall, C.J.).

55. *See* The Big Aurora, 11 U.S. (7 Cranch) 1382 (1813); *see also* Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) (ruling that Congress may delegate to courts the authority to alter modes of proceedings but state legislatures do not possess this power).

56. Several commentators have observed that while the Supreme Court has never formally abandoned the nondelegation doctrine, it has been seriously, arguably fatally, compromised. *See, e.g.*, DAVIS, *supra* note 14, at 150-157. *See also* Peter H. Aranson, Ernest Gellhorn and Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982).

57. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON ADMINISTRATIVE PROCEDURE 8-9; *see also* CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 3 (2d ed. 1994) ("The pace of growth [of administrative agencies] accelerated after 1860 as new departments were added.").

58. *See* 2 MORISON, *supra* note 46, at 74-75. At the end of the Civil War, there were approximately two million factory workers producing $3,385,000,000 worth of goods.

period prompted increased government regulation.[59] In *Munn v. Illinois*,[60] the U.S. Supreme Court upheld an Illinois law, which set maximum rates for storage in grain elevators.[61] The Court rejected the plaintiff's argument that the rates violated the Fourteenth Amendment's prohibition against the taking of private property without due process of law.[62] It articulated the principle that "when private property is 'affected with a public interest, it ceases to be a *juris privati* only."[63] The principle that justified regulation was in accord with liberal economic and rights theory.[64] State regulation of the rates was sometimes necessary to insure that individual entrepreneurs might flourish in a competitive and neutral market.[65] In *Munn*, the Supreme Court exercised judicial review and upheld the state regulation on the ground that the regulation was necessary to maintain a competitive market.[66]

The legitimacy of judicial review of administrative action was further developed by the regulation of the railroads during the nineteenth century.[67] In 1887, Congress attempted to regulate the rail-

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Id. at 72. *Id.* at 72. Thirty years later in 1899, there were approximately six million factory workers producing $11,407,000,000 worth of goods. *Id.*

59. Organized labor was a response to the massive pool of potential workers created by the waves of immigration that characterized the post-Civil War period unfair working conditions, exploitation, and inadequate compensation led to widespread labor unrest stimulating the need for government regulation. Annual immigration passed 300,000 persons in 1866 and rose to almost 790,000 in 1882. *Id.* at 80-83.

60. 94 US. 113 (1876).

61. *Id.* at 114-17.

62. *Id.* at 135-36. *See* Rabin, *supra* note 25, at 1208.

63. *Munn*, 94 U.S. at 126 (citing Lord Chief Justice Hale, De Portibus Maris, 1 HARG. LAW TRACTS 78).

64. The principle reflected another one drawn from an earlier New York case, *Palmer v. Mulligan*, 3 Cai. R. 307 (N.Y. Ch. 1805). The New York court had abrogated the common law rule regarding water rights, under which downstream landowners were permitted to recover damages for obstructions created by upstream owners when the obstruction blocked the natural flow of water. *Id.* In *Palmer*, a downstream plaintiff's claim for damages as a result of an upstream private dam was disallowed on the ground that the construction of the dam advanced business interest by enabling competition. *Id.* For a statement of the common law rule, see *Acton v. Blundell*, 152 Eng. Rep. 1223 (1843).

65. *See* Rabin, *supra* note 25, at 1208-09.

66. 94 U.S. at 131-2. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, 2-3 (1977).

67. Railroads exercised immense power and through the mere manipulation of rates could make an industry or ruin a community. Yet, it would be an oversimplification to view railroads as the victors in a conquest between themselves and the producers. Railroads also suffered from competitive pricing in certain areas of the country. *See* Rabin, *supra* note 25, at 1197-1201. With colossal funds at their disposal, the financial resources of railroads often overshadowed the budgets of the state governments in whose territory they operated. *See* GEORGE HILL MILLER, RAILROADS AND THE GRANGER LAWS 19-20 (1971). Enchantment with progress and development and opposition to increasing the powers of the federal government led most Americans of the period to view the rail-

roads when it passed the first Interstate Commerce Act, which declared illegal all "unreasonable" rates and all "unfair" business practices.[68] Enforcement was vested in the first modern American independent administrative agency, the Interstate Commerce Commission ("ICC").[69] Starting with the 1897 case of *ICC v. Cincinnati, New Orleans & Texas Pacific Railway*,[70] the Supreme Court manifested hostility to the ICC by holding that the administrative agency was not vested with the power to establish rates since Congress had neglected to imbue it with such power.[71] The Court stated:

> It is not to be supposed that Congress would ever authorize an administrative body to establish rates without inquiry and examination . . . . [I]t would be strange if an administrative body could . . . create for itself a power which Congress had not given to it . . . . Our conclusion then is that Congress has not conferred upon the commission the legislative power of prescribing rates either maximum or minimum or absolute.[72]

Later that year in *ICC v. Alabama Midland Railway*,[73] the Court rejected the ICC's interpretation of the Act's "special cases" exception and held:

> that competition between rival routes is one of the matters

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road industry as a series of private business ventures operated by individual entrepreneurs or corporations with little public interest involved. *See* 2 MORISON, *supra* note 46, at 75. In the case of *Chicago, Milwaukee & St. Paul Railway v. Minnesota*, 134 U.S. 418, (1889), the U.S. Supreme Court expressly stated the view that the "reasonableness" of a rate set by a Minnesota railroad commission was "eminently a question for judicial investigation." *Id.* at 457-58.

68. Prior to federal regulation of the railroads, in 1838 and again in 1852, Congress had passed legislation that established an elaborate regulatory scheme for construction and maintenance of steamboat boilers, including regular testing and inspection of the boilers. Rabin, *supra* note 25, at 1196.

69. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379, 383 (1887). *See also* Isaiah L. Sharfman, *The Interstate Commerce Commission: An Appraisal*, 46 YALE L.J. 915 (1937); 2 MORISON, *supra* note 46, at 75. A cogent summary of the various scholarly accounts and the political activity which culminated in the enactment of the Interstate Commerce Act may be found in SKOWRONECK, *supra* note 25, at 125-150. Serving as the archetype for the modern administrative agency, the ICC was vested with broad powers of rule making and adjudication to regulate national industry. *See* SCHWARTZ, *supra* note 37, § 1.10, at 21-22.

70. 167 U.S. 479 (1897).

71. *Id.* at 511.

72. *Id.* at 509-11.

73. 168 U.S. 144 (1897).

> which may lawfully be considered in making rates, and that substantial dissimilarity of circumstances and conditions may justify common carriers in charging greater compensation for the transportation of like kinds of property for a shorter than for a longer distance over the same line.[74]

The combined effect of *Cincinnati* and *Midland* was to undercut the force and effectiveness of federal regulatory agencies.[75] In *Midland*, Justice Harlan dissented and expressed the view that:

> Taken in connection with other decisions defining the powers of the Interstate Commerce Commission, the present decision, it seems to me, goes far to make that commission a useless body for all practical purposes, and to defeat many of the important objects designed to be accomplished by the various enactments of Congress relating to interstate commerce.[76]

By finding either that the congressional delegation was per se overly broad or that an agency acted outside the parameters of a statutory delegation, the Supreme Court retained final authority to determine when a delegation of legislative power violated the constitutional separation of powers doctrine.[77] While it refrained from expressly declaring null the power of the federal regulatory agency to police the market, the Supreme Court upheld judicial review as the principal means of determining the legitimate scope of administrative authority.[78]

During this period as judicial review developed to reveal ambivalence about administrative power, the Supreme Court also re-

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74. *Id.* at 170.

75. When the Supreme Court upheld government regulation, it has been suggested that it was in the interest of the railroads themselves. *See* GABRIEL KOLKO, RAILROADS AND REGULATION, 1877-1916 (1965) (indicting that railroads themselves were the principal interest group that favored regulation). Kolko's theory has been critiqued as too narrow an explanation of a complex historical reality. *See, e.g.*, Henry Pucell, *Ideas and Interests: Businessmen and the ICC*, 54 J. AMER. HIST. 568 (1967) (illustrating that merchant shippers were the principal interest group); LEE BENSON, MERCHANTS, FARMERS, & RAILROADS: RAILROAD REGULATION AND NEW YORK POLITICS, 1850-1887 (1955) (demonstrating that the influence of New York merchants to gain a competitive advantage was a primary factor that led to enactment of the ICC).

76. 168 U.S. at 176 (Harlan, J., dissenting).

77. Congress would eventually pass legislation--the Hepburn Act in 1906 and the Mann-Elkins Act in 1919--that made clear its intention to vest the ICC with full power to police unfair competitive practices in the railroad industry. *See* Rabin, *supra* note 25, at 1235.

78. The underlying constitutional issue is whether a particular delegation violates the constitutional requirement that "[a]ll legislative power herein granted shall be vested in a Congress . . . ." U.S. CONST. art. I, § 1.

vealed its concern for individual autonomy. In *Lochner v. New York*,[79] the Court invalidated a New York state statute that limited the number of hours a baker might work to sixty per week and ten per day.[80] Writing for the majority, Justice Peckham championed the individual's subjective right to enter contracts over the limited scope of state police power. Justice Peckham described the statutes such as the one under review in *Lochner* as "mere meddlesome interferences with the rights of the individual."[81] Peckham's reasoning disclosed that government regulation was thought to be constitutionally suspect to the extent that it hampered individual autonomy.

The constitutional values of personal autonomy and the suspicion of administrative power were consistent with the Supreme Court's laissez-faire perspective. A blatant example of laissez-faire perspective may be seen in the case of *Hammer v. Dagenhart*,[82] when the Supreme Court struck down a federal law that prohibited interstate commerce in products made by workers under fourteen years of age.[83] The Court objected to the federal law on the ground that it exceeded the power vested in Congress to regulate interstate commerce under the Constitution, arguing that Section 8 of Article I of the Constitution provides that "Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes . . . ."[84] It reasoned that manufacturing was a local matter and did not come under the purvey of the commerce clause.[85] It would be an oversimplification to suggest that the Court's attitude toward the new government regulation was entirely dependent on the laissez-faire approach.[86] It was clear, nonetheless, that the

79. 198 U.S. 45 (1905).

80. *Id.* at 64.

81. *Id.* at 61. Justice Holmes dissented arguing that no particular economic philosophy was written into the Constitution, and that the New York law promoted a legitimate protection of health by the state. *Id.* at 74-76 (Holmes, J., dissenting).

82. 247 U.S. 251 (1918).

83. *Id.* at 276.

84. *Id.* (quoting U.S. CONST. art. I, § 8). For a discussion of how the power of Congress to regulate interstate commerce under the "commerce clause" has proved to be a significant area of controversy in the history of the Supreme Court, see TRIBE, *supra* note 50, at 319-423.

85. *Hammer*, 247 U.S. at 276. Continuing his objection to the Court's laissez-faire ideology, Justice Holmes dissented, arguing that the Constitution permitted Congress substantial leeway to expand the field of regulatory control: "The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command." *Id.* at 281 (Holmes, J., dissenting).

86. *See* Rabin, *supra* note 25, at 1236. The Supreme Court's approach to the Sherman Antitrust Act also revealed ambivalence. *See* Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890). The language of the Act, passed by Congress in 1890, permitted room for

Supreme Court viewed the individual as a kind of private entrepreneur whose subjective natural rights to own vast amounts of private property or to enter into contracts to work long hours were protected under the Constitution. Any government attempts to regulate the free market were met with suspicion when they appeared to infringe on individual rights. The Court's adherence to the pristine doctrine of the modern liberal state--characterized by individual rights, a free market and neutral government--was evident.

Despite the Supreme Court's hesitation to endorse wholeheartedly the form of regulatory government, a new theory of administrative law was established by the dawn of the twentieth century.[87] In his 1916 Presidential Address to the American Bar Association, Elihu Root presciently observed what the period was witnessing:

> [T]he creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex directions the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general conditions prescribed by superior authority. The necessities of our situation have already led to an extensive employment of that method . . . . [T]he old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight . . . . Yet

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considerable interpretation. The Act declared illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" and it proscribed all activity to "monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize" any aspect of interstate or foreign commerce. §§ 1-2, 26 Stat. 209. In the decade following the passage of the Act, the Court interpreted the Act strictly to void the pooling arrangements of the railroads. *See* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (invalidating agreement between competing railroads to fix rates as a restraint of trade). At the same time, the Court refused to find that the whiskey and sugar trusts violated the Act. United States v. E. C. Knight Co., 156 U.S. 1 (1895).

87. FRANK J. GOODNOW, COMPARATIVE ADMINISTRATIVE LAW, AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS, NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY 6-7 (1893) (noting that the French had developed a distinct system of precepts which was known as *droit administratif*, Goodnow's treatise on comparative administrative justice admonished that "the general failure in England and the United States to recognize an administrative law is really due, not to the non-existence in these countries of this branch of the law but rather to the well-known failure of English law writers to classify the law"). ERNST FREUND, CASES ON ADMINISTRATIVE LAW, SELECTED DECISIONS OF ENGLISH AND AMERICAN COURTS (1911). The 1911 publication of Freund's casebook on administrative law indicated that the theory was considered an acceptable aspect of law school study. *Id.*

> the powers that are committed to these regulatory agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers, these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed, and that with us is still in its infancy, crude and imperfect.[88]

In 1927, Felix Frankfurter wrote that:

> [t]he formulation and publication of executive orders and rules and regulations are in this country still in a primitive stage . . . [b]ut the range of control conferred by Congress . . . upon subsidiary law-making bodies, variously denominated as heads of departments, commissions and boards, penetrates in the United States . . . the whole gamut of human affairs.[89]

As this historical period drew to its end, "administrative agencies as a device of government had been effectively established," and "administrative procedure as a body of law carrying its own principles and philosophy largely awaited recognition and development."[90] To supplement the nondelegation doctrine, a collateral theory of "government necessity" was developed to uphold the increasing delegation of government powers to administrative agencies.[91] Suspicion of government power and concern for individual autonomy would continue to play a role as the principles and philosophy of the new administrative justice emerged.

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88. Elihu Root, *'Public Service by the Bar,' Address of the President*, REPORT OF THE 39TH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, CHICAGO, ILL., AUG. 30, 31 AND SEPT. 1, 1916, 368 (1916).

89. Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 614 (1927).

90. Jerry S. Williams, *Fifty Years of the Law of the Federal Administrative Agencies--And Beyond*, 29 FED. BAR J. 267, 268 (1970).

91. *See* Hampton & Co. v. United States, 276 U.S. 394 (1928) (upholding Congressional authority to delegate to the President the power to increase or decrease tariffs).

II. JUDICIAL REVIEW FROM THE NEW DEAL TO THE ADMINISTRATIVE PROCEDURE ACT: FROM SUSPICION TO DEFERENCE AND THE REFASHIONED AUTONOMY

The Supreme Court's review of New Deal regulatory programs marked a major transition in the development of administrative law.[92] The Supreme Court's initial pronouncements on the National Industrial Recovery Act ("NIRA") and the Agricultural Adjustment Act ("AAA") reflected suspicion of administrative action.[93] In May 1935, the Supreme Court invalidated the NIRA in a sweeping and unanimous decision in the landmark case of *Schechter Poultry Corp. v. United States*.[94] *Schechter* stemmed from a suit brought by the operators of a kosher slaughterhouse in New York City, who had been convicted of violating the Live Poultry Code, which had been established pursuant to Title I of the NIRA.[95] The Supreme Court overturned the conviction and invalidated Title I of the NIRA on the ground that the Act represented a virtual unlimited extension of government regulatory power over private business.[96] In addition, the Court reasoned that the idea of private business groups developing their own federally enforceable codes usurped the proper legislative function of the Congress.[97] Such activity, the Court declared, violated the nondelegation doctrine.[98]

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92. Comprehensive historical analysis of the New Deal may be found in: 2 MORISON, *supra* note 46, at 299-328; PAUL K. CONKIN, THE NEW DEAL (1967); ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY, A STUDY IN ECONOMIC AMBIVALENCE (1966); WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940 (1963).

93. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933), and Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933). *See also* Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (striking down a portion of the NIRA as an overly broad delegation of legislative power).

94. Schechter Poultry Corp. v. United States, 295 U.S. 388 (1935). One interpretation of cases such as is that they represent a second ideological undercurrent to the New Deal. Pursuant to this interpretation, hostility to delegation was merely a "constitutional cover" for hostility to the New Deal's economic and social objectives. *Cf.* KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE 11 (3d Ed. 1994).

95. *Schechter*, 295 U.S. at 519. Title I of the NIRA prescribed the drafting and application of codes by representative industry groups to achieve multiple objectives including the facilitation of economic recovery and reform, the cessation of child labor through the establishment of a minimum age, and the creation of collective bargaining agreements. The various codes were to constitute federally enforceable standards for each industry. If an industry failed to adopt such a code, the law granted the President the authority to promulgate a code of his own making. In all, more than seven hundred industries were codified, and approximately twenty-three million workers fell within the scope of the various codes. 2 MORISON, *supra* note 46, at 306.

96. *Schechter*, 295 U.S. at 553.

97. *Id.* at 527.

98. *Id.* Arguably, *Schechter* seems to have been the only nondelegation decision

Consistent with its approach in *Schechter*, the Supreme Court in *United States v. Butler*[99] declared the AAA unconstitutional on the ground that once again the Congress had exceeded the constitutional limits of the government's regulatory authority.[100] Processors of farm products, who were taxed under the AAA to pay for the government subsidies to farmers, challenged the Act under the general welfare clause of Article I, Section 8, of the Constitution.[101] The Section, which empowers Congress to tax for the purpose of raising funds for the nation's debts and for the general welfare, states in relevant part: "The Congress shall have [p]ower [t]o lay and collect [t]axes, [d]uties, [i]mposts, and [e]xcises, to pay the [d]ebts and provide for the common [d]efence and general [w]elfare of the United States."[102] The general welfare, the *Butler* Court delineated, did not include the regulation of agriculture through a tax on processors to pay subsidies to farmers.[103]

The Court's initial suspicion of regulatory power was manifested not only in the separation and delegation doctrines, but in a concern for personal autonomy. In *Morehead v. New York ex rel. Tipaldo*,[104] the Court struck down a New York minimum-wage law for women.[105] Reminiscent of the *Lochner* reasoning, to reach the result in *Morehead*, a five-member majority of the Court relied on the freedom to contract theory. The Court stated:

> The right to make contracts about one's affairs is a part of the liberty protected by the due process clause. Within this liberty are provisions of contracts between employer and employee

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to have survived the eventual seat change at the Supreme Court. *See* JAFFE, *supra* note 14, at 66.

99. 297 U.S. 1 (1936).

100. *Id.* at 78. Congress passed the AAA in order to rectify the problem of widespread farm foreclosures caused by an enormous surplus of farm products and abysmally low prices paid to farmers for their produce. The Act authorized the Department of Agriculture to pay farmers for destroying certain surplus commodities such as wheat, cotton and tobacco, and certain livestock such as pigs and cows, and for reducing the future planting and breeding. 2 MORISON, *supra* note 46, at 307. Like the NIRA, the Act was enormously successful in achieving its end. For example, tobacco growers, who had received forty-two million dollars for their 1933 crop, netted one hundred twenty million in 1934 for a smaller crop. *Id.*

101. U.S. CONST. art I, § 8.

102. *Id.*

103. 297 U.S. at 65. In contrast to the *Schechter* decision, the *Butler* majority did not enjoy unanimity among the nine Justices. In a stinging dissent, Justice Stone warned his colleagues against a "tortured construction of the Constitution," which overlooks that "[c]ourts are not the only agency of government that must be assumed to have the capacity to govern." *Id.* at 87 (Stone, J., dissenting).

104. 298 U.S. 587 (1936).

105. *Id.*

> fixing the wages to be paid. In making contracts of employment, generally speaking, the parties have equal right to obtain from each other the best terms they can by private bargaining. Legislative abridgment of that freedom can only be justified by the existence of exceptional circumstances. Freedom of contract is the general rule and restraint the exception.[106]

Despite the pressing economic hardships that the New York law programs were designed to alleviate, the Supreme Court seemed determined to protect individual autonomy through the subjective rights language of freedom of contract and private property.[107]

Within a year of the *Morehead* decision, however, the Supreme Court reversed its course in the case of *West Coast Hotel v. Parrish*.[108] Notwithstanding its prior decisions in *Lochner* and in *Morehead* striking down maximum hour and minimum wage laws,[109] in *West Coast Hotel* the Court upheld a New York statute that provided such protection to working women.[110] The Court predicated the shift on "recent economic experience" which demonstrated "[t]he exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage . . . ."[111] No longer was the freedom to contract, which had served as the basis of the *Lochner* rational, paramount in the Court's evaluation. Instead, the Court now recognized the legitimacy of the legislature's efforts to protect an exploited class of workers from employers who were in a superior bargaining position.[112] All that was required to affect the dramatic shift was the vote of Justice Roberts who voted with the five-member majority in both the *Morehead* and *West Coast Hotel* decisions.[113]

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106. *Id.* at 610-611.

107. The Supreme Court's rejection of several of the New Deal's most prominent programs caused considerable political turmoil, and President Roosevelt threatened to increase the number of Justices on the Court so as to appoint Justices in tune with his program. For a detailed discussion of the controversy, see William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan*, SUP. CT. REV. 347 (1966).

108. 300 U.S. 379 (1937).

109. *See* Adkins v. Children's Hospital, 261 U.S. 525 (1923) (striking down a District of Columbia minimum wage law).

110. 300 U.S. 379, 400 (1937).

111. *Id.* at 399.

112. *See* Rabin, *supra* note 25, at 1260.

113. Confronted with the Roosevelt threat to achieve the ends of the New Deal, the shift was referred to euphemistically as "the switch in time which saved nine." *See* Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311 (1955). *See also* Rabin, *supra* note 25, at 1261.

The shift in language from individual freedom of contract to the protection of a class of exploited individuals represented a redefined notion of individual autonomy. The Court was apparently now willing to mitigate its adherence to the pristine notion of the liberal state characterized by the economic rights of the individual as entrepreneur, market autonomy, and neutral government. Implicit in the shift was recognition of the reality that not all individuals compete on an even playing field when the market is left to develop without government regulation. The Court recognized a state's legitimate interest in regulation that protected individual workers from the exploitation of an industry. While the goal of the Court remained the protection of the individual person, the Court had expanded the notion of autonomy. The limited parameters of the nineteenth-century view of the individual as entrepreneur, who enjoyed great liberty in entering into contracts, was transformed to encompass the class of individuals whose economic well being was now dependent on a certain level of government regulation through administrative agencies.[114]

Along with the refashioning of the notion of autonomy, judicial suspicion of administrative power shifted to judicial deference. In *NLRB v. Jones & Laughlin*,[115] the Court upheld the National Labor Relations Act ("NLRA") against the familiar argument that steel manufacturing was local and did not constitute a valid exercise of congressional authority pursuant to the Commerce Clause.[116] Articulating a new and expansive conception of the government regulatory power under the Commerce Clause, Chief Justice Hughes stated in the majority opinion:

> The fundamental principle is that the power to regulate commerce is the power to enact "all appropriate legislation" for "its protection and advancement .... That power is plenary and may be exerted to protect interstate commerce "no matter what the source of the dangers which threaten it." Although

114. *Cf.* C.R. SUNSTIEN, FREE MARKETS AND SOCIAL JUSTICE 322-326 (1997) (suggesting that the democratic aspiration of the New Deal were defeated since centralized national government actually diminished opportunities for citizens to participate and promoted unproductive struggles between well organized factions).

115. 301 U.S. 1 (1937).

116. *Id.* at 49. With the demise of the NIRA, President Roosevelt called for the establishment of a National Labor Relations Board, which would be empowered to police unfair labor practices throughout the industrial sector. Essentially, the NLRA was an initiative that recognized organized labor as a countervailing force to big business. National Labor Relations Act, ch. 372 § 1, 49 Stat. 449 (1935). Through this legislation the federal government afforded the legitimacy to organized labor that it had long afforded under traditional common law notions of private property and contract to big business. *See* HAWLEY, *supra* note 92, at 195.

> activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from the burdens and obstructions, Congress cannot be denied the power to exercise that control.[117]

A new era had dawned for the administrative agencies in the legitimate exercise of government regulatory authority.[118] A series of cases followed in which the Supreme Court upheld various New Deal programs including, *inter alia*, the Social Security Act and the re-enacted AAA.[119]

While the Supreme Court was firmly committed to the availability of judicial review of agency actions to individuals who incurred injury to a legal right, the limited scope of the review permitted the administrative agencies wide latitude. In the case of *NLRB v. Hearst Publications Inc.*,[120] the Court adopted a highly deferential attitude towards administrative agency action.[121] Newspaper publisher William Hearst appealed from a determination by the National Labor Relations Board that required him to enter into collective bargaining with a union that represented newsboys.[122] Disputing the finding of the Board that the newsboys were "employees" within the meaning of the NLRA, Hearst contended that the newsboys were private contractors. Upon judicial review of the Board's determination, the Supreme Court deferred to the Board's expertise and upheld the determination.[123] Both socio-economic necessity and institutional self-preservation may be underlying factors that led to the mitigation of a strict application of pristine liberal theory from the New Deal to the post-war era. The Supreme Court expanded the parameters of the class of individuals whose personal autonomy enjoyed protection by legal rights. At the same time, the expanded parameters also weak-

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117. *Jones*, 301 U.S. at 36-37 (citations omitted).

118. *See* DAVIS & PIERCE, *supra* note 94, at 12-13.

119. *See, e.g.*, Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (upholding the Social Security Act); Helvering v. Davis, 301 U.S. 619 (1937) (upholding the AAA); and United States v. Darby, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act). By the late 1930s, the New Deal's administrative government was an established feature on the landscape of American government. As the economic conditions that the New Deal had initially addressed became less pressing, the focus shifted from the issue of the legitimacy of government regulation to scrutiny of the procedure through which the vast federal bureaucracy reached decisions. *See* Rabin, *supra* note 25, at 1264.

120. 322 U.S. 111(1944).

121. *Id.*

122. *Id.* at 130.

123. *Id.*

ened the strident language of individual entrepreneurial rights by placing them in balance with the notion of the larger societal good.

Concomitant with the post World War II expansion of government bureaucracy, there was an increase in the number of appeals brought by individuals seeking judicial review of administrative acts.[124] In a trilogy of cases, the Supreme Court delineated the availability of review through standing requirements. The Court held in *Alabama Power Co. v. Ickes*,[125] that a taxpayer did not enjoy standing to sue a federal agency that had granted financial aid to municipal electrical power companies.[126] The taxpayer's claim, the Court reasoned, amounted to "a clear case of *damnum absque injuria*."[127] In *FCC v. Sanders Bros. Radio Station*,[128] the Court interpreted statutory language that granted judicial review to "persons aggrieved" by an FCC license determination to include the competitor of the licensee.[129] The Court held in *Perkins v. Lukens Steel Co.*[130] that standing to challenge an agency action required some "legal right" which must be "shown to have been invaded or threatened in the complaint."[131] Thus, a claim of some competitive injury that was based merely on financial damage or loss of income as a result of the agency action, and not on a legal right, did not suffice to satisfy the threshold requirement of standing to bring the recourse.[132]

Subsequent to World War II, Congress passed the Administrative Procedure Act of 1946 ("APA").[133] A central feature fashioned by Con-

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124. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMISSION ON ADMINISTRATIVE PROCEDURE, *supra* note 57 , at 9-11.

125. 302 U.S. 464 (1938).

126. *Id.* at 475.

127. *Id.* at 479.

128. 309 U.S. 470 (1940)

129. *Id.*

130. 310 U.S. 113 (1940).

131. *Id.* at 125 (Standing to sue the agency may be recognized, outside the right to sue created by the statute, when an individual alleges a violation of some other recognized legal right.).

132. Only in *Sanders* did the Court acknowledge that the plaintiff has standing to sue when the statute at issue expressly created standing for those "aggrieved or whose interests are adversely affected." *Sanders*, 309 U.S. at 476-77 (quoting 47 U.S.C. § 402(b)(6) (1982)).

133. *See* Administrative Procedure Act, ch. 324, 60 Stat. 237 (1947); current version at 5 U.S.C. §§ 551-59, 701-06, 1305, 3105, 3344, 6362, 7562 (1996). *See generally*, Martin Shapiro, *APA: Past, Present, Future*, 72 VA. L. REV. 447 (1986). In 1938, Roscoe Pound chaired a special committee on administrative justice under the auspices of the American Bar Association. The committee concluded that the individualization of justice would be well served by adopting several traditional judicial procedures. These included adequate notice to concerned parties, a hearing before reaching a decision, decisions based on the record and not on matters extraneous to the case, respect for jurisdictional

gress in the new legislation addresses the procedure for agency rule making. The APA required that an agency afford preliminary notice of a proposed rule, opportunity for public comment, and a statement of the basis and purpose for a rule.[134] Another important area addressed by Congress was agency adjudication.[135] The APA entitled an individual, suffering a legal wrong due to an agency action, to review by the agency itself, and then by the federal courts if necessary.[136] In addressing both agency rule making and adjudicatory functions, Congress fashioned administrative law along the traditional procedures employed by the courts to resolve conflicts between individuals and government officials.[137] The APA was designed to ensure fairness and consistency in the treatment of individuals, and to confine the deci-

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limitations, clarification of the roles of advocate, prosecutor, and judge, and distinguishing the functions of investigation, prosecution, and rule making. *See Report of the Special Committee on Administrative Law*, 63 ABA REP. 331, 346-351 (1938). These conclusions are summarized in a slightly different form in Rabin, *supra* note 25, at 1264. For a critical discussion of the ABA Report, *see* Louis J. Jaffe, *Invective and Investigation in Administrative Law*, 52 HARV. L. REV. 1201, 1236-42 (1939).

134. 60 Stat. at 239. In the wake of the APA's adoption, Henry Hart, Albert Sacks, and Louis Jaffe, advocated that the administrative agency should have broad law-making authority. Given the complexity of modern society, Congress has no choice but to delegate a large dose of discretion to administrative agencies to make findings of fact and to draw conclusions of law. The determination of an agency should only be overturned when the reviewing court becomes convinced that the administrative action falls outside the parameters of the "clear purpose" of the statute that the agency seeks to implement. This school of thought accepts congressional delegation of legislative power to administrative agencies as long as the delegating statute expresses a clear purpose. A reviewing court should uphold administrative action up to the point at which the court becomes convinced that the purpose of the statute is contradicted. Moreover, an exercise of legislative power by an administrative agency enjoys a presumption of falling within the agency's discretion. *See* Henry Hart & Albert Sacks, Materials On the Legal Process 1-24, 212-25 (unpublished manuscript, 1958); JAFFE, *supra* note 14, at 572-76; Louis J. Jaffe, *The Illusion of The Ideal Administration*, 86 HARV. L. REV. 1183 (1973). Other contemporary commentators also embrace the approach advocated by Professor Jaffe as at least a partial solution to the nondelegation issue. *See, e.g.*, Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985). Like many contemporary mainstream commentators, who are eclectic in approach to the nondelegation problem, Professor Diver agrees with aspects of the "interest group remedy" proffered by Professor Richard Stewart. *See* Colin S. Diver, *Policymaking Paradigms in Administrative Law*, 95 HARV. L. REV. 393, 423-24 (1981).

135. H.R. REP. No. 79-1980 (1946), *reprinted in* 1946 U.S.C.C.A.N. 1195, 1205 [hereinafter HOUSE JUDICIARY REPORT] ("It provides . . . the requirements for administrative hearings and decisions in cases in which statutes require such hearings.").

136. 60 Stat. at 243; *see also* HOUSE JUDICIARY REPORT, *supra* note 135, at 1205 ("It sets forth a simplified statement of judicial review designed to afford a remedy for every legal wrong.").

137. *See* HOUSE JUDICIARY REPORT, *supra* note 135, at 1205 ("[T]he provisions for judicial review afford parties a method for enforcing their rights in proper cases.").

sions of agency officials to the parameters of congressional delegation.[138]

The revised approach to judicial review seemed to allay the suspicion of government power reflected in the separation of powers and nondelegation doctrines. The new direction of judicial review was a realistic response to the reality that large-scale doses of Congressional delegation of legislative, executive and judicial power to administrative agencies are a necessary aspect of modern government.[139] Once the Court accepted the new arrangement of administrative government, the modified understanding of the traditional doctrines required that an administrative agency act within parameters contemplated by Congress.[140] The role of the judiciary was not to substitute its own judgments about issues of public policy but rather to ascertain that agency decisions remained consistent with the Congressional intent.[141] Judicial deference to administrative action seemed to reach its

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138. *See id.* ("The bill is an outline of minimum essential rights and procedures . . . . It affords private parties a means of knowing what their rights are and how they may protect them, while giving a simple framework upon which to base such operations as are subject to the provisions of the bill.").

139. *Cf.* Yakus v. United States, 321 U.S. 414 (1944) (upholding a system of wartime price controls against a delegation doctrine challenge); Mistretta v. United States, 488 U.S. 361 (1989) (upholding a Congressional statute that authorized a commission to create sentencing guidelines); Loving v. United States, 116 S.Ct. 1737 (1996) (upholding a statute that authorized the President to determine a list of aggravating factors that would merit the imposition of the death penalty in court martials).

140. *See* SCHWARTZ, *supra* note 37, at 31 ("The changed judicial attitude encouraged Congress . . . to make broader delegations to agencies than had formerly been their want.").

141. Starting with the New Deal and continuing into the 1960s, faith in the ability of administrative government to address the ills of society reached its zenith. By the advent of the 1960s, administrative agencies were executing a bewildering variety of functions in American society in areas as diverse as: education, mental and physical health, natural resources, transportation, government benefits, housing, energy and immigration. The agencies exercised authority through promulgating rules, conducting inspections, issuing licenses and adjudicating grievances by private individuals. When Lyndon B. Johnson assumed the Presidency after the assassination of John F. Kennedy, he inherited the blueprints for a War on Poverty which he declared in his program the Great Society. On the development of the War on Poverty and the Great Society, see James L. Sundquist, *Origins of the War on Poverty* in ON FIGHTING POVERTY: PERSPECTIVES FROM EXPERIENCE 1-18 (James L. Sundquist, ed., 1969). Johnson's program aimed at a veritable *mélange* of social problems such as blighted neighborhoods, race relations, housing, mental health care, education and juvenile delinquency. The centerpiece of the program was the Economic Opportunity Act of 1964, 78 Stat. 508 (1964). At the core of the program was the concept of "community action" through which government administrative agencies were to enlist "maximum feasible participation" among the poor. For a critical discussion of this approach, see generally DANIEL P. MOYNIHAN, MAXIMUM FEASIBLE MISUNDERSTANDING, COMMUNITY ACTION IN THE WAR ON POVERTY (1969). The underlying theory of the program was that federal agency action would penetrate into the grass roots

summit in *United States v. Morgan*.[142] In an earlier appeal in the same case, the Supreme Court had remanded to the federal trial court with instructions to depose the Secretary of the Department of Agriculture regarding the basis of his decision making process. Alarmed by the lower court's aggressive implementation of its order, the Supreme Court admonished that it was not within the parameters of judicial review to "probe the mental processes of the Secretary."[143] Rather, the Court held that the decision making process of an administrative official under scrutiny was entitled to the same level of respect as that shown to a judge.

The Supreme Court seemed committed to a high level of deference to administrative actions upon judicial review. First, it promulgated a standing requirement limiting the availability of judicial review of an administrative action to one who suffered an injury to a legal right.[144] Next, the scope of review of administrative action was highly deferential to agency expertise.[145] Pursuant to the APA, the Supreme Court permitted the administrative agencies wide discretion.[146] Further, the Court required that upon scrutiny of the decision making process of those who exercised administrative power, deference similar to that shown to the judge's decision making process be shown.[147] A final factor demonstrating judicial deference was that even when a federal court found an abuse of discretion, rather than substitute its own judgment, it remanded the case to the administrative authority.[148]

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of American society. In the tradition of Roosevelt's New Deal, the Johnson administration seemed intent on creating societal utopia through an ever-expanding list of specialized government programs. Although the federal administrative agencies appeared to be "emboldened" by the optative attitude about government, the hermeneutics of autonomy and suspicion were about to reemerge. Rabin, *supra* note 25, at 1296. *See* HENRY J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962).

142. 313 U.S. 409 (1941).

143. *Id.* at 422.

144. *See supra* text accompanying notes 122-24.

145. *See* SCHWARTZ, *supra* note 37, at 31 ("One consideration cut across the system of administrative law that the courts were constructing: deference to the administrative expert.").

146. *See* 5 U.S.C. § 706(2)(A) (1996).

147. U.S. v. Morgan, 313 U.S. 409, 422 (1941) ("[A]lthough the administrative process has had a different development and pursues somewhat different ways from the courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.").

148. Another perspective on judicial review was afforded by Kenneth Culp Davis. *See* 5 DAVIS, *supra* note 14, at 392-404. Davis observed that courts were free to adopt a standard of review that simply inquired as to whether an agency decision was reasonable or to substitute their own independent judgment about the outcome of a given case. *Id.* The problem with this approach, according to Davis, was the lack of consistent guidelines

The propensity of the Court to call into question the legitimacy of administrative agency action at the start of the New Deal had been supplanted by a pervasive sense of judicial deference in the post-World War II era.[149] One explanation for the shift may be found in the dire economic plight of the nation during the Great Depression. The Court adopted a "broad interpretation of the commerce, taxing and general welfare clauses of the Constitution . . . which made possible the application of the Constitution to an industrialized nation."[150] The proliferation of administrative agencies was required for the stimulation and regulation of the market to produce certain goods and services that could be enjoyed by the public at large.[151] Additionally, these specialized administrative agencies were better equipped than the Congress to provide the "continuous expert supervision" required by the complexities of economic well-being in the modern democracy.[152] A second explanation indicates that institutional self-preservation led to the shift. Only when they were confronted with President Roosevelt's plan to pack the Court did the Justices appreciate that the political landscape had been transformed so that the established interests of big business were supplanted by a new more powerful set of self-interests.[153] The Court's own political credibility, perhaps survival, depended on its willingness to jettison the laissez-faire approach in favor of expanded administrative government.[154]

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about whether the court chooses the deferential standard of review or the stringent one. *Id.* He proposed that predictability of outcomes would be enhanced if the court would determine the comparative competence of the administrative or judicial body to reach a correct result in a given case. *Id.* The comparison could be based on factors already considered by the courts such as agency consistency over a long period of time, whether the agency or the court exercises a special competence over the subject matter of the case, whether the issue involves an interpretation of law or a finding of fact, and whether the agency-exercised delegation is consistent with the statute under which Congress empowered it. *Id.* On the basis of this comparison of whether the administrative agency or the court was better qualified to reach a particular determination, the court would then choose either the deferential or the strict standard of judicial review. *Id.*

149. *See* Rabin, *supra* note 25, at 1271-72; *see also* SCHWARTZ, *supra* note 37, at 31.

150. *See* 2 MORISON, *supra* note 46, at 322.

151. *See* CASS, *supra* note 59, at 8.

152. *See* WALTER GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 9 (1941).

153. *See Fireside Chat by President Franklin D. Roosevelt* (national radio broadcast, Mar. 9, 1937); *see e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

154. *See* Aman, *supra* note 25, at 1113-14 (1988) (discussing Roosevelt's "court-packing" speech and its connection to change in judicial decision making); Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941, 960 (2000) (noting that "Roosevelt dropped his 'court-packing' plan, however, when one Justice 'switched' and cast his vote . . . .").

These divergent, but not necessarily mutually exclusive, explanations of the Court's shift may also be applied to the period of judicial deference to administrative decision making that followed World War II. On the one hand, socio-economic necessity justified the Court's deference to administrative regulation and expertise within certain limited spheres entrusted to the agency. At the same time, the enactment of the APA may be understood as the result of "a highly conventional lawyer's view of how to tame potentially unruly administrators."[155] The Court's imprimatur of the APA advanced the Court's own self-interest, since the Act confirmed the role of judicial review of the exercise of administrative power.

III. THE ADMINISTRATIVE STATE: THE LIMITS OF AUTONOMY AND OSCILLATION BETWEEN SUSPICION AND DEFERENCE

As the size of the federal bureaucracy grew in the 1960s, public concern about government obligations to individual citizens became more acute.[156] In an influential article, Charles Reich argued that the pervasive influence of government in American life required that individual property rights or interests be created in the wide host of government services, benefits, contracts, franchises and licenses.[157] Traditionally, many government positions and benefits were considered privileges granted to an individual, and such privileges did not

155. *See* Rabin, *supra* note 25, at 1265.

156. *See* James O. Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 307-09 (1976); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1279-80 (1984); Aman, *supra* note 25, at 1103-11. Following the Vietnam War, a national upsurge of interest in the issues of health, safety, conservation, environment and consumerism contributed to yet another expansion in American administrative justice. To address these areas of concern, increased government regulation through agency rule making (often involving a high level of technological and economic expertise) was necessary. Rabin, *supra* note 25, at 1279-95. Given their vast influence and power over the lives of most Americans, "basic public trust in the administrative process and the spirit of working partnership between agency and reviewing courts that had developed in the postwar period began to disintegrate." For one explanation of this distrust, see James Q. Wilson, BUREAUCRACY 68 (1989) ("Bureaucracies will in time acquire a distinctive personality or culture that will shape the attitudes of people who join these organizations . . . . There is a good deal of evidence to suggest that the political views of bureaucrats tend to correspond to their agency affiliation . . . ."). *See also* Robert Kagan, *Adversarial Legalism and American Government*, 10 J. PUB. POL. & MANAGEMENT 369 (1991) ("Americans want government power to do more, but government power is fragmented and mistrusted. So Americans seek to achieve their goals by simultaneously demanding more government and by fragmenting it and regulating it still further.").

157. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733-87 (1964). For another influential article at this time period, *see also* Henry Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268-71 (1965) (describing the unprecedented expansion of procedural norms at that time period).

constitute legally protected rights.[158] Justice Holmes had expressed the traditional understanding with his often quoted dictum, in upholding the firing of a police officer for political activities, that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[159] The government role was akin to that of a private donor who could withdraw, or impose conditions upon, a gift at will. Reich's argument called the traditional distinction between right and privilege into doubt. According to his approach, government entitlements were to constitute the "new property," in order to safeguard "the troubled boundary between the individual man and the state."[160]

In the landmark case of *Goldberg v. Kelly*,[161] the Supreme Court seemed to abandon the traditional distinction.[162] Welfare recipients in New York claimed that it was a violation of the Due Process Clause for the state to deprive them of welfare benefits without first conducting a formal hearing.[163] The Court held that the welfare benefits in question constituted a statutory entitlement rather than a mere privilege, and therefore, due process required the conduct of a judicial-type hearing prior to termination of such benefits.[164] Following *Goldberg*, the Supreme Court reached a number of decisions that affirmed the right to due process in connection with government entitlements.[165]

However, optimism about the "new property" created on the basis of due process rights was soon tempered. In *Matthews v. Eldridge*,[166] the Supreme Court held that an evidentiary hearing was not required prior to the termination of Social Security disability benefits.[167] The

158. *See* Bailey v. Richardson, 182 F.2d 46, 57 (D.C. Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951) ("[T]he [D]ue [P]rocess [C]lause does not apply to the holding of a government office."). *Cf.* Greene v. McElroy, 360 U.S. 474, 496 (1959) ("[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.").

159. McAuliffe v. Mayor of New Bedford, 29 N.E. 517 (Mass. 1892).

160. Reich, *supra* note 157, at 742.

161. 397 U.S. 254 (1970).

162. *Goldberg*, 397 U.S. at 262.

163. *Id.* at 256-57.

164. *Id.* at 263-64.

165. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (Due process required that high school students who disrupted class and physically attacked a police officer be afforded a hearing before being suspended from school.); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) (dismissed security guard at a public school who lied on his employment application had a right to a hearing prior to termination of employment).

166. 424 U.S. 319 (1976).

167. *Id.* at 349.

Court identified three factors that must be balanced in determining the extent of due process to be afforded a recipient of a government benefit prior to the termination of the benefit.[168] The balancing test required consideration of the private interest injured by the administrative action, the risk of erroneous deprivation of the entitlement and the probable value of additional or substitute procedures, and the public interest including financial and administrative burden that additional due process would entail.[169] It has been suggested that the "new property" ultimately was doomed to fail since, under the guise of respect for individual autonomy, it failed to provide any type of moral basis for the promotion of a "*conscientious* pattern of conduct." Rather than advance individual autonomy, programs of government largess were designed to encourage a "*conformist* mode of behavior" among the beneficiaries.[170]

During the 1960s, the federal circuit courts also became suspicious that the administrative agencies were exhibiting a bias in favor of politically influential constituents.[171] The U.S. Court of Appeals for the District of Columbia addressed the issue in *Office of Communications of the United Church of Christ v. FCC*.[172] The appellant, United Church of Christ, sought standing to challenge the decision of the FCC to grant a renewal of a license to a Jackson, Mississippi television station which had engaged in a number of discriminatory practices, such as cutting off a network program on race relations when a representative of the National Association for the Advancement of Colored People was about to speak.[173] The appellant also claimed that the television station had illegally discriminated against the local Roman Catholic Church.[174] The D.C. Circuit held that the appellant had standing to challenge the administrative action on the ground that it was within the public interest for the administrative agency to hold a public hearing to hear the complaints of discrimination.[175] Since the FCC had failed to conduct such a hearing prior to its determination to renew the license, the Circuit Court revoked the license.[176] Al-

168. *Id.* at 335.

169. *Id.*

170. *See* Robert Rabin, *The Administrative State and Its Excesses: Reflections of the New Property*, 25 U.S.F. L. REV. 273 (1990).

171. *See* Rabin, *supra* note 25, at 1296. It was difficult, however, to demonstrate that the so-called "captive agencies" showed a consistent bias in favor of certain politically influential constituents, however. *See* Louis J. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105 (1954).

172. 359 F.2d 994 (D.C. Cir. 1966).

173. *Id.* at 997.

174. *See id.* at 997-98.

175. *Id.*

176. *See id.* at 1006-07, 1009.

though the FCC restored the license after conducting the proper public hearing, the decision had far reaching consequences for the relationship between the federal courts and the administrative agencies.[177] No longer would the federal courts simply defer to agency expertise.

The renewal of suspicion had been presaged by the decision of the U.S. Court of Appeals for the Second Circuit in *Scenic Hudson Preservation Conference v. Federal Power Commission*.[178] The Federal Power Commission (FPC) had granted Consolidated Edison of New York a license to construct a hydroelectric power plant at Storm King Mountain on the Hudson River.[179] Prior to granting the license, the administrative agency had held a truncated public hearing at which it refused, *inter alia*, to hear evidence on the environmental impact of the power plant.[180] On appeal, the Second Circuit seriously questioned the agency's expertise in the conduct of the hearing.[181] The agency had failed, in the Court's opinion, to consider adequately the public interests at large rather than those of the regulated party.[182] Reversing the administrative act of granting the license, the federal court rejected the FPC's narrowly focused process of approving the license and required a full hearing to assess the project's impact on the river site's natural forms of life, scenic beauty, and historical value.[183]

As in *Church of Christ*, an erosion of faith in agency expertise was apparent. Concomitant with the rise in administrative agencies, judicial review was becoming more active.[184] Among the most promi-

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177. *See* Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1059-60 (1997) (discussing the beginning of the criticism of administrative agencies around 1967); Rabin, *supra* note 25, at 1298 (noting the Court's changing attitude toward administrative agencies and the activist judicial review that emerged).

178. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

179. *Id.* at 611.

180. *See id.* at 618-19, 623-24.

181. *Id.*

182. *See id.* at 620.

183. *See id.* at 612-13.

184. Stewart, *supra* note 27, at 1668, 1756-85. In a 1975 article, Richard Stewart suggested that the inclusion of proper "interest group representation" would serve to assure that administrative agencies act within the parameters of statutory delegation. *Id.* Such interest groups, Stewart argued, must have the right to participate in the agency decision making process and to have their various perspectives adequately considered by the agency in that process. *Id.* Through judicial scrutiny of the administrative process, administrative agencies can be required to provide opportunities for participation and adequate consideration of interest groups in decisions that affect them. *Id.* The judicial branch affords greater interest group participation by reliance upon liberal notions of due process and standing. In facilitating the representation of various societal interests in administrative justice, the courts help to overcome the problems caused by the breakdown of the traditional model's governance through consent. *Id. See also* STEPHEN G.

nent of the decisions reflecting the new judicial focus on individual rights was that of the D. C. Circuit in *Greater Boston Television Corp. v. FCC*.[185] The case involved a sixteen-year struggle to determine the licensee to operate a television station in Boston.[186] Circuit Judge Harold Leventhal stated that the federal court would intervene in an agency decision if it "becomes aware, especially through a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision making."[187] Through a critique of the agency decision making process, the so-called "hard look" doctrine manifests judicial suspicion of administrative government.[188]

The Supreme Court adopted the renewed suspicion in *Citizens to Preserve Overton Park, Inc. v. Volpe*.[189] James Volpe, Secretary of the Department of Transportation, approved federal funding for a highway to be constructed through Overton Park in Memphis. Federal law prohibited the use of federal funds for road construction through public parks if a "feasible and prudent" alternative existed.[190] Since he was not required to do so under federal law, the Secretary reached his determination without conducting a public hearing on the issue. The lack of a formal hearing, or record thereof, meant that on appeal of the Secretary's determination, the Supreme Court had only the affidavit of the Secretary upon which to review the matter.[191] Not willing to defer to the Secretary's expertise, the Court reversed the determi-

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BREYER, REGULATION AND ITS REFORM 378 (1982); Diver, *supra* note 134, at 423-24.

185. 444 F.2d 841 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

186. *Id.* at 844.

187. *Id.* at 851.

188. *See* Zellmer, *supra* note 154, at 999-1000 (discussing "hard look" analysis and the various degrees to which it has been employed to take a closer look at agency actions). In contrast to the traditional model of judicial scrutiny, another approach stresses technocratic expertise and "bureaucratic rationality." In a comprehensive analysis of social security disability insurance, Mashaw focused on the question of "mass justice" in the administrative state. Mashaw contended that the courts "are truly incompetent to deal with the complexities and subtleties of engineering and managing a large administrative decision process." He argued that carefully designed organizational routines and management methods, as opposed to the tradition of judicial review of administrative action, constituted the most effective guarantor of administrative justice. As applied to disability benefits, it would be the role of the legislature to set the values and goals, and the role of administrative agency to adjudicate individual cases consistent with the legislative directives. This remedy envisions clear judgments from the Congress on questions of value, and cost-effective administrative adjudication of individual claims consistent with the legislative value judgments. *See* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 193, 225 (1983); Jerry L. Mashaw, *The Management Side of Due Process*, 59 CORNELL L. REV. 772 (1994).

189. 401 U.S. 402 (1971).

190. 49 U.S.C. § 303 (1982).

191. *See Overton Park*, 401 U.S. at 409.

nation and remanded the case to the federal district court to conduct fact finding since a reconstruction of the Secretary's decision making process was essential to a proper judicial review of the determination.[192] The federal courts decided a number of cases that followed the reasoning of *Overton Park*.[193]

The 1978 case of *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*[194] signaled a return to judicial deference. In *Vermont Yankee*, the Supreme Court addressed the issue as to whether the judiciary may impose additional procedural safeguards during the rule making process than those required by the APA.[195] The issue arose when the Atomic Energy Commission (AEC) conducted rule making proceedings to assess the environmental consequences of spent nuclear fuel. Rather than offer the opportunity for formal, trial-like proceedings as envisioned in sections 556 and 557 of the APA, the AEC elected an intermediate route, and permitted somewhat more formal proceedings than those *de minimis* requirements for informal rule making under section 553.[196] The Supreme Court held that agencies were required only to afford the minimum extent of due process as stipulated in the relevant provision of the APA.[197] The judiciary, the Court reasoned, could not substitute its judgment for that of Congress as expressed in the APA.[198]

By the start of the 1980s, the system of having a large number of central administrative authorities, each possessing objective competence and expertise to promulgate far reaching rules, was well established.[199] When Ronald Reagan became President in January 1981, he

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192. *Id.* at 420-21.

193. *See, e.g.*, Am. Textile Mfrs. v. Donovan, 452 U.S. 490, 540 (1981) (holding that the federal administrative agency must consider protection of worker health and safety to be the paramount value under the Occupational Safety and Health Act); TVA v. Hill, 437 U.S. 153, 195 (1978) (overturning administrative approval of a multimillion dollar dam project); Kennecott Copper Corp. v. EPA, 462 F.2d 846, 851 (D.C. Cir. 1972) (overturning the environmental standard established by the administrative agency and remanding to the agency for a more adequate explanation of the basis of the agency's rule making).

194. 435 U.S. 519 (1978).

195. *Id.* at 525.

196. *Id.* at 535. The Court noted that the AEC followed section 553 and additional procedures in the rule making process. *Id.*

197. *Id.* at 547-48. The Court indicated that a court may not overturn an administrative ruling on grounds of inadequate procedure "so long as the Commission employed at least the statutory *minima*, a matter about which there is no doubt in this case." *Id.* at 548.

198. *See id.* at 544-45 (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

199. *See* Peter J. Strauss, *An Introduction to Administrative Justice in the United States*, 1 ADMINISTRATIVE LAW THE PROBLEM OF JUSTICE, ANGLO-AMERICAN AND NORDIC SYSTEMS 614-647 (Aldo Piras ed., 1991).

proposed that a certain degree of deregulation was necessary to respond to the new demands of an increasingly global economy.[200] Global competition in a free-market economy, it was argued, required that regional or national regulation of industry not unfairly burden a domestic industry against its foreign competitors. Regan's programmatic deregulation set the stage for one of the most significant cases ever handed down by the Supreme Court concerning judicial review of administrative action. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[201] the Supreme Court held that, if Congress expressly or implicitly delegated law interpreting power to the agency, the Court must follow any reasonable agency interpretation of an ambiguous statute.[202] Reagan had ordered the Environmental Protection Agency (EPA) to repeal the rule promulgated during Jimmy Carter's presidency that established stringent air pollution controls under the Clean Air Act. Pursuant to the directives of the Reagan administration, the EPA introduced the so-called "bubble concept," whereby an entire plant rather than an individual facility in the plant was considered the source of the air pollution.[203] The Reagan administration sought to justify the repeal on the ground that such stringent regulation placed an unfair burden on American industries competing in a global economy.[204] Although the net effect of the bubble concept was to lessen the stringency of the Clean Air Act, the Court in *Chevron* deferred to the EPA's interpretation of the Act.[205]

In reaching its conclusion, the *Chevron* Court identified a two-part analysis.[206] The first question upon judicial review of an agency interpretation of a statute asks whether the congressional intent behind the statutory provision is clear.[207] An affirmative answer requires both the court and administrative agency to yield to the clear legislative intent.[208] When congressional intent remains ambiguous, however, a reviewing court must defer to a reasonable agency interpretation of the statute.[209] The meaning of the phrase "stationary source" in

200. *See* Aman, *supra* note 25, at 1192-1193; *see also* Noll, *Regulation After Regan*, 12(3) REG. 13-20 (1988) (arguing that regulation did not protect consumers and was a less effective measure than markets and other incentives such as taxes in dealing with market failures).

201. 467 U.S. 837 (1984).

202. *Id.* at 845.

203. *Id.* at 840.

204. *See* 46 Fed. Reg. 16,280 (Oct. 14, 1981); *see also* 46 Fed. Reg. 50,766 (Oct. 14, 1981).

205. *See Chevron*, 467 U.S. at 842-66.

206. *Id.* at 842-43.

207. *Id.*

208. *See id.*

209. *Id.*

the statute was unclear in *Chevron;* and therefore, following the second part of the analysis, the Supreme Court deferred to the EPA's bubble concept as a reasonable interpretation.[210]

Despite the Supreme Court's attempt to articulate a simple two-part analysis in *Chevron*, the meaning of the analysis seems open to conflicting interpretations. In defense of *Chevron*, Supreme Court Justice Antonin Scalia has suggested that the decision represents a confluence of all the pre-*Chevron* cases that deferred to agency interpretation of a statute.[211] Scalia does not think that judicial deference to agency interpretation may be justified simply on the basis that the agency possesses a greater degree of expertise in a given field than a reviewing court. Nor does he believe that the holding in *Chevron* is required by the separation of powers doctrine. Scalia argues that the judiciary does, in fact, enjoy the constitutional power to evaluate competing policies as an aspect of the traditional tools employed by courts to interpret statutes.[212] Rather, Scalia believes that the extent to which a court must defer to agency interpretation of a statute is a function of Congress. He interprets *Chevron* to constitute "an across-the-board presumption that, in the case of ambiguity, agency discretion is meant."[213] According to this interpretation, the Supreme Court has replaced a statute-by-statute evaluation with a rule of law that when Congress leaves a statutory provision ambiguous, it intends that the judiciary defer to any reasonable agency interpretation.[214] Rejecting this interpretation of *Chevron* as simplistic, Supreme Court

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210. *See id.* at 860-66.

211. *See* Antonin Scalia, *Judicial Deference to Agency Interpretation of Law*, 1989 DUKE L.J. 511, 515 (1990).

212. *See* MCI Telecomm. Corp. v. American Telephone & Telegraph Co., 512 U.S. 218, 226 (1994). In *MCI*, Justice Scalia, writing for the majority, rejected the FCC's detariffing policy. *Id.* After an analysis of the meaning of the word "modify" in the statute, the Court held that the agency interpretation was not entitled to judicial deference when the interpretation depends on a meaning of the word that permits a fundamental revision of the statute and not a modification. *See id.* at 229; *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION 29-32 (1996) ("[T]he objective indication of the words, rather than the intent of the legislature, is what constitutes the law . . . .")

213. Scalia, *supra* note 209, at 516.

214. *See* INS v. Cardoza Fonseca, 480 U.S. 421, 454 (1987) (Scalia, J., concurring). In *Cardoza-Fonseca*, Scalia stated:

> [T]his Court has consistently interpreted *Chevron* - which has been an extremely important and frequently cited opinion, not only in this Court but in the Courts of Appeals - as holding that courts must give effect to a reasonable agency interpretation of the statute unless that interpretation is inconsistent with a clearly expressed congressional intent.

Id. But see Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529 (1997) (noting that the agency needs flexibility to interpret and adapt statutory text in accord with particular circumstances, policies and values raised in each case).

Justice Stephen Breyer has suggested that questions of statutory interpretation are too diverse and complex to adopt a single rule approach.[215] Justice Breyer argues that the current doctrine of judicial review is "anomalous," since it mandates deference to agency interpretation of statutes, while at the same time, it seems to require close scrutiny of agency discretion among competing policy choices.[216] With regard to policy choices in particular, Breyer thinks that it would be a mistake for courts to "retreat" from an ad hoc approach to review of agency discretion. Such an abdication of responsibility by the judiciary would place the entire onus on the other two branches of government to check "agency excesses."[217]

A more fundamental critique of judicial review of administrative action views *Chevron* as a repudiation of *Marbury* for the bureaucratic state. This view suggests that the traditional view of the judiciary as the final arbiter of disputes between individual citizens and government has been abrogated in favor of specialized administrative organs responsible for the implementation of public policy.[218] Administrative justice no longer concerns the autonomy of the individual protected through liberal rights theory. The special competence of courts at appraising fairness to individuals must now cede to the technical expertise of administrative bureaucrats in determining what policies optimally advance the general welfare.[219] The critique is equally dubious about the future of the separation of powers doctrine. It argues that the *Chevron* and *Vermont Yankee* decisions demonstrate that the judiciary has abdicated its function in the system of checks and balances. The judiciary's function as a balance wheel to curtail administrative excesses has been nullified, leaving in its place only a bureaucratic

215. *See* Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 377 (1986); *see also* Babitt v. Sweet Home Chapter of Comms. for a Greater Or., 515 U.S. 687, 708 (1995) (An agency head "will confront difficult questions of proximity and degree," and judicial review of agency decisions with regard to such questions must proceed "through case-by-case resolution and adjudication."); Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (discussing five different circumstances when a court might examine legislative history for assistance in interpreting a statute).

216. Breyer, *Judicial Review*, *supra* note 215, at 364-65; *cf.* Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487 (1983) (suggesting that different types of administrative discretion and judicial review thereof need to be distinguished for effective administrative government).

217. Breyer, *Judicial Review*, *supra* note 215, at 397.

218. *See* Aman, *supra* note 25, at 1229-30 (criticizing the *Chevron* decision and the resulting expansion of judicial deference to policy choices made by administrative agencies at the expense of judicial review). *But see* Zellmer, *supra* note 154, at 1007-08 (refuting the critique of *Chevron* as a reversal of the *Marbury* concept of judicial review and arguing that policy choices should be left to the legislative and executive branches of the government).

219. *See* Elliott, *supra* note 12, at 1523.

vacuum waiting to be filled. If this fundamental critique is accurate, the constitutional theory that underpins administrative law has collapsed.[220] Pursuant to the liberal political theory, freedom is defined primarily by the absence of governmental restraint. The state is always to be suspect, and its powers carefully curtailed. The doctrines of the separation of powers and nondelegation of government power reflect this suspicion. To the extent that a neutral arbiter is not present to resolve disputes between government and the governed, liberal political theory has been defiled.

In the recent case of *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*,[221] the United States Supreme Court invalidated administrative rules that were designed to curb tobacco use by minors.[222] After considering a plethora of scientific data as part of the rule making process, the Food and Drug Administration (FDA) had made certain factual findings about the nature and effects of tobacco. The agency determined that cigarettes are "drug delivery devices" because they contain nicotine, a highly addictive "psychoactive substance."[223] Acknowledging that cigarette smoking may result in grave injury to the human body and brain, the agency further found that the majority of human persons who develop a tobacco addiction start to smoke cigarettes while they are still minors.[224] Upon judicial review, all nine members of the Supreme Court agreed with the agency finding that cigarette smoking poses "extraordinary risks" to health and life.[225] Nonetheless, a five-member majority of the High Court felt obligated to invalidate regulations that restricted the mar-

220. *See* EDLEY, *supra* note 10, at 133-134, 213-64. Christopher Edley has concluded that American administrative justice with its vast delegation of executive, legislative, and judicial functions to non-elected officials, has seriously compromised the pristine liberal model. *Id.* Given the impracticability of the pristine nondelegation doctrine, Edley suggests that the "'administrative' state is now inevitable because of the ever-lengthening agenda of complex public policy problems and the institutional limitations of legislatures." *Id.* at 5. Despite the intent that the tripartite separation of powers safeguards against arbitrariness, unelected administrators must be delegated broad discretion to perform legislative and adjudicatory functions. While he is not optimistic about the survival of the tripartite separation of powers, Edley calls for a more direct partnership among the legislative, judicial, and administrative components of government. *Id.*

221. 529 U.S. 120 (2000).

222. *Id.* at 125.

223. *Id.* at 125-26.

224. *Id.* (citing Nicotine in Cigarettes and Smokeless Tobacco is a Drug and These Products are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination, 61 Fed. Reg. 44,397, 44,402, 44,631-32, 44,849, 44,398-99 (1996)).

225. *Id.*

keting, distribution, and sale of cigarettes to persons under the age of eighteen.[226]

The majority reasoned that Congress had not delegated to the FDA the requisite authority to regulate tobacco products. The reasoning reflected the principle, drawn from the constitutional doctrine of a separation of powers, that unelected federal judges and administrative agency heads may act only within the parameters of the clearly expressed intent of Congress.[227] The separation of powers doctrine in turn rests on the classical liberal political theory that exhibits suspicion about the exercise of government power against individual autonomy.[228] *Brown & Williamson Tobacco* suggests that judicial review may not be as defunct as the critics claim. The Court annulled the seemingly reasonable agency rules on the ground that the Congress had not specifically delegated to the FDA the power to promulgate such regulations. The Court's recent action once again reflects the liberal suspicion of government power as constitutionally encoded in the separation of powers and delegation doctrines.

During the final decades of the twentieth century, the Supreme Court's review of asylum decisions reflected the limits of the protection of personal autonomy through constitutional rights. The Refugee Act of 1980[229] provided that political refugees might be granted asylum in the United States at the discretion of the Attorney General.[230] Starting in the early 1980s, large numbers of Haitian citizens began to flee their country in hope of gaining political asylum in the United States.[231] In 1981, the Reagan administration ordered the United States Coast Guard to interdict all Haitian vessels destined for American shores and interview any person on board who intended to claim refugee status. The purpose of the brief interview was to determine whether an individual's asylum claim merited entry into the United States where further and more formal proceedings could tran-

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226. *Id.* at 1302 (citing 61 Fed. Reg. at 44,398).

227. *Id.* at 1297 (quoting Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984)); Kenneth Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 308, 312 (1986) (noting that the constitutional separation of powers requires *Chevron* reasoning). *But see* Scalia, *supra* note 213 (reasoning that rather than the separation of powers doctrine, the theoretical justification for *Chevron* is a general presumption that in case of ambiguity about congressional intent, the courts are to defer to agency discretion).

228. *See generally* EDLEY, *supra* note 11, at 133-34 (arguing that the conventional understanding of administrative law as simply reflecting policy choices made by the legislature and executive under the review of the judiciary, fails to reflect the complexities of government in the modern administrative state).

229. 94 Stat. 102 (1980), 8 U.S.C. § 1157 (1988).

230. *See id.*

231. Kevin R. Johnson, *A 'Hard Look' at the Executive Branch's Asylum Decisions*, 1991 Utah L. Rev. 279 (1991).

spire.[232] Most claims, however, were summarily dismissed on the high seas without any pretense of due process.[233] In 1991, the United States State Department reported to Congress that the Haitian army, in overthrowing the government, had "resorted to brutality and massacre to control the population . . . employing violence to intimidate opposition political supporters, popular organizations, the urban poor, and the media . . . ."[234] Subsequent to the military coup in Haiti in the fall of 1991, as thousands fled their homeland in order to repatriate, the Bush administration established a detention policy under which Haitian refugees, while still on the high seas, were interdicted and detained in Guantánamo Bay, Cuba.[235] When the American naval base in Guantánamo could no longer handle the large number of Haitian refugees, the policy was changed so that interdicted persons were immediately returned to Haiti without any effort whatsoever to determine whether they had credible asylum claims.[236]

As early as 1982, opponents of the short shrift shown to Haitian refugees had brought suit in the federal district court in order to obtain a judicial remedy against the administrative policy.[237] Typically, the determination of political refugee status, an administrative judgment left to the State Department and the INS, was granted almost

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232. The policy was entered into by the United States and Haitian governments. *See* U.S.-Haiti Interdiction Agreement, Signed at Port-au-Prince, September 23, 1981, Exec. Order No. 12,324, 3 C.F.R. § 180 (1982), *reprinted in* 8 U.S.C. § 1182 app. at 1259 (1988).

233. Johnson, *supra* note 231, at 283-84.

234. U.S. DEP'T OF STATE, 102d Cong., *Country Reports on Human Rights Practices for 1991*, pp. 633-34 (Comm. Print 1992).

235. The detention of the Haitian refugees in Cuba was not without irony. When Fidel Castro overthrew the Cuban government in a violent revolution in 1959, thousands of Cuban nationals fled their homeland in order to avoid persecution and hardship. Castro's Communist government quickly suppressed any semblance of freedom of press, speech, religion, and assembly. Without due process of law, many were incarcerated, brutalized, and murdered. Private property was seized, and citizens were routinely relocated to agricultural camps. Horrified by the turn of events, the U.S. government quickly extended a welcome to the refugees who often arrived in Florida by means of small boats and make-shift rafts after enduring immense suffering. For an account of the Cuban revolution and the repressive policies of the Castro government, see EDWARD GONZALEZ, CUBA UNDER CASTRO: THE LIMITS OF CHARISMA (1974). This is not to suggest, however, that every aspect of Castro's reform has had an adverse impact on the Cuban people. Compared to other Caribbean nations, Cuba of the 1990s has significantly less poverty and illiteracy, and better health care for the poor. *See* MARIFELI PÉREZ-STABLE, THE CUBAN REVOLUTION: ORIGINS, COURSE AND LEGACY (1993).

236. The new regulation stressed that "parole" to the United States for further proceedings was to be afforded only when it was "strictly in the public interest." 8 C.F.R. § 212.5 (1991).

237. *Louis v. Nelson*, 544 F. Supp. 973, 1004 (S.D. Fla. 1982), *affirmed in part, reversed in part*, 711 F.2d 1555 (11th Cir. 1983).

automatically.[238] Even while Cubans escaping Castro's repressive government were routinely afforded political asylum, Haitians fleeing what was at the time a seemingly more repressive regime had little hope to expect similar treatment.[239] The Supreme Court's 1985 decision in *Jean v. Nelson* rejected constitutional arguments brought on behalf of the Haitians subject to the interdiction.[240] Commenting on the 1980 Refugee Act, the Supreme Court observed that it constituted legislative recognition of the administrative policy of the previous thirty years under which unlimited "parole" was afforded almost automatically to refugees who fled to the United States from political persecution.[241] The Court noted the Solicitor General's word that there was no ongoing discrimination against Haitians by the INS, and remanded the case to the district court for consideration as to whether or not INS officials acted within their broad statutory discretion.[242] In 1991, the Court again adopted a deferential stance to administrative policy of Haitian interdiction when it held in *United States Department of State v. Ray*[243] that INS was not bound under the Freedom of Information Act to release the names of Haitians who sought asylum, but were returned to Haiti.[244] The Court reasoned that the Freedom of Information Act was not intended as a means offered to refugee advocates and human rights activists for verifying whether or not persons who were returned to Haiti suffered subsequent persecution.[245] Thus, the judicial branch acquiesced to the administrative policy of interdiction and summary dismissal of asylum claims without constitutional due process.[246]

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238. *See* Jean v. Nelson, 472 U.S. 846, 849 (1985).

239. From June 1983 to September 1988, the INS granted seven times more asylum claims for Cubans than for Haitians, despite the much larger number of Haitian refugees and the fact that many Cubans seeking asylum were convicted felons. Johnson, *supra* note 231, at 346. In 1992, the INS continued to grant a large number of Cuban claims. *See* Larry Rohter, *New Wave of Cubans Sails to Florida Illegally*, N.Y. TIMES, Oct. 7, 1992, at A1.

240. 472 U.S. at 857.

241. *See id.* at 849 (describing the parole as "unlimited").

242. *Id.* at 855-57.

243. 502 U.S. 164 (1991).

244. *Id.* at 78.

245. *Id.* at 177-79.

246. It was argued that the Bush administration's interdiction program violated international law. *See* Arthur C. Helton, *The Mandate of U.S. Courts to Protect Aliens and Refugees Under International Human Rights Law*, 100 YALE L.J. 2335, 2335-46 (1991). Bill Clinton promised that, if elected President, he would reverse the policy. Upon being elected, President Clinton reneged on his campaign promise and continued the policy of the Bush administration. Kevin R. Johnson, *Judicial Acquiescence to the Executive Branch's Pursuit of Foreign Policy and Domestic Agendas in Immigration Matters: The Case of the Haitian Asylum Seekers*, 7 GEO. IMMIGR. L.J. 1, 10-14 (1993).

As the twenty-first century dawned, the Supreme Court upheld the role of judicial review of the exercise of administrative power in two cases involving the deportation of resident aliens. At the outset of this article, the Court's decisions in *INS v. St. Cyr* and *Zadvydas v. Davis* were mentioned as examples of a broad interpretation of the judiciary's jurisdiction to review administrative action.[247] In these cases, the Supreme Court refused to preclude judicial review of habeas petitions brought by resident aliens who had been convicted of aggravated felonies and were to be deported after serving prison terms. The alien in *St. Cyr* sought to challenge Attorney General Janet Reno's opinion that Congress had withdrawn administrative discretion to waive deportation pursuant to the standard interpretation of Section 212(c) of the Immigration and Nationality Act.[248] The two men to be deported in *Zadvydas* petitioned for review of their indefinite detention subsequent to deportation proceedings, when no nation could be identified that was willing to receive the deportees.[249] They disputed the interpretation of statutory changes in immigration law that the Attorney General enjoyed non-reviewable discretion to detain deportees.[250] The five-member majority in *Zadvydas* acknowledged that Congress has "plenary power" to fashion immigration law, and that the judicial branch must defer to legislative and executive policy.[251] A slightly different five-member majority recalled in *St. Cyr* that judicial review functions to express the constitutional limits on the exercise of executive and legislative power.[252] In both cases, the Court was confronted with constructions of the respective statutes that precluded judicial

247. *See* pp. 91-92 *supra*.

248. *See* INS v. St. Cyr, 121 S. Ct. 2271, 2276 (2001). In *St. Cyr*, the Court stated "the class of aliens whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for § 212(c) relief have been granted." *Id.* at 2276-77.

249. *See* Zadvydas v. Davis, 121 S. Ct. 2491, 2496-97 (2001) (Kestutis Zadvydas was rejected by Germany, Lithuania and the Dominican Republic while in INS detention from 1994-1997 prior to his habeas petition to the Federal District Court in the Eastern District of Louisiana. After the ninety-day removal period expired, the Federal District Court for the Western District of Washington determined that there was no "realistic chance" for Cambodia to accept deportee Kim Ho Ma.).

250. *Id.* at 2497 (The deportees did not dispute the Attorney General's discretion but rather the extent of the Attorney General's authority under the statute of the post-removal period statute.).

251. *Id.* at 2501 (Justice Stephens delivered the opinion of the Court joined by Justices Kennedy, Souter, Ginsberg and Breyer.).

252. *See St. Cyr*, 121 S. Ct. at 2278-79 (Justice Breyer delivered the opinion of the Court, joined by Justices Stevens, O'Connor, Souter and Ginsburg. Noting the "strong presumption in favor of judicial review," the Court adopted a construction of the statute that would not give rise to constitutional problems.).

review; and in each instance, the Court elected alternative interpretations that did not raise fundamental constitutional problems.[253]

An important distinction between the Haitian refugee cases and *St. Cyr* and *Zadvydas* lies in the judicial doctrine that the constitutional due process guarantees do not apply to aliens outside the United States.[254] Contrary to the plight of the Haitian refugees on the high seas, these more recent cases attest to the Supreme Court's willingness to protect the autonomy of resident aliens. Yet, the slim and sundry majorities in the more recent immigration cases indicates that the Court's approbation of judicial scrutiny might facilely shift to deference toward administrative action.

IV. CONCLUSION

Given the increasing significance of national and global regulatory regimes, this article has sketched in broad strokes the development of judicial review of administrative power in the United States.[255] The description has been organized around three historical periods identified as: from the eighteenth and nineteenth centuries; to the New Deal and the APA; to the second half of the twentieth and start of the new century. In addition to the statutory and common law justifications for judicial review, the article has suggested that judicial review in the federal courts has developed to maintain two values that underpin the constitutional theory of liberal democracy. The interrelated values are the suspicion of government power as manifested through the tripartite separation of powers, and personal autonomy as safeguarded through individual rights.

1. Suspicion of Administrative Power

Despite the doctrine against the delegation of legislative and judicial power, federal administrative agencies vested with such power expanded throughout the eighteenth and nineteenth centuries. Fol-

253. *See id.* at 2279 ("A construction of the amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions."); *Zadvydas*, 121 U.S. at 2498 (When the construction of a statute raises a serious constitutional problem, the Court will ascertain if an alternative, nonproblematic construction, is available.).

254. *See Zadvydas*, 121 U.S. at 2493 (citing Shaughnessy v. U.S. *ex rel.* Mezei, 345 U.S. 206 (1950) (nonresident aliens do not benefit from the procedural protections of the United Sates Constitution)). *See also* U.S. v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (due process guarantees of the Fifth Amendment do not apply to aliens outside the territorial boundaries of the United States).

255. Systems of national and global administrative government now regulate the distribution of such fundamental human resources as food, housing, education, social security, energy, environment, financial capital, and technological information.

lowing the Civil War, the Court exercised its power of judicial review in *Cincinnati* to curtail the activity of the ICC on the ground that Congress had not delegated it the power to establish rates.[256] The post-bellum Supreme Court permitted only administrative action that remained within the contours of the specific congressional delegation.

This judicial suspicion continued at the inception of the New Deal when the Court struck down the broad delegation of government power in *Schechter Poultry*.[257] The Court's eventual approval of the NLRA, the Social Security Act and the re-enacted AAA marked a shift from suspicion to deference. After World War II, the enactment of the APA coincided with judicial deference. At the same time, the APA's explicit provisions for judicial review preserved suspicion. Designed upon the traditional model, the APA provisions were intended to ensure that legislative delegations of power were not overly broad, and specific actions of unelected bureaucrats remained within the parameters of the power delegated to the administrative agency by statute.

As the bureaucratic state expanded in the 1960s, rule making and adjudication by administrative agencies began to constitute the primary manifestation of government activity into the lives of most Americans. The federal courts reasserted the suspicion of administrative power by adopting the "hard look" approach to judicial scrutiny of agency decision making process. In *Overton Park*, the Supreme Court refused to defer to the expertise of the Secretary for the Department of Transportation about the location of a highway.[258] However, in its landmark *Chevron* decision, the Court returned to a more deferential approach to agency interpretations of underlying congressional legislation.[259] Most recently, in *Brown & Williamson Tobacco*, the Court invalidated FDA rules on the ground that Congress had not delegated the power for the administrative agency to regulate tobacco products.[260] Even as regulatory regimes have required increasingly complex technical expertise by administrators, judicial review has served as an ongoing reminder that the legislative body, and not unelected technical experts, are vested by the citizens to reach fundamental policy choices. As long as administrators have acted in accord with the legislative design, the courts have tended to show deference to regulatory goals and implementation.

256. 167 U.S. 479, 511 (1897).
257. 295 U.S. 495, 539, 551 (1935).
258. 401 U.S. 402, 419-20 (1871).
259. 467 U.S. 837, 865-66 (1984).
260. 529 U.S. 120 (2000).

2. Individual Autonomy

Nineteenth century administrative law cases disclose a vision of the radically autonomous entrepreneur—whether a railroad baron seeking to create a monopoly or a single craftsman contracting to work long hours—who enjoyed subjective rights to enter contractual agreements unfettered by undue government interference. Only government regulation that was crafted to maintain an allegedly neutral market and compensate for market failure was likely to pass judicial muster. As illustrated in the infamous *Lochner v. New York*, decision, the Supreme Court attempted to justify its laissez-faire attitude towards the government regulation of business with language that identified the individual's subjective right to enter contracts and own private property.[261]

This laissez-faire approach continued even up to the start of the New Deal regulatory programs. The Supreme Court initially adhered to a preference for entrepreneurial autonomy when it invalidated key components of the New Deal recovery plan, the NIRA and AAA. The reasoning of *Lochner* reappeared in *Morehead*, when the Court invalidated a state statute that established a minimum wage for women.[262] As the executive and legislative branches of the federal government passed regulatory programs to protect the autonomy of many individuals, left unemployed by the economic crisis of the Great Depression, judicial review became more deferential to the programs. In a series of cases starting with *West Coast Hotel*, the protection of autonomy shifted from concern for private entrepreneurs to the rights of working-class individuals.[263] The new judicial deference to government efforts that protected the rights of individual citizens extended throughout the post-World War II years. During this period, the newly enacted APA fashioned the procedure of administrative justice to ensure fairness, consistency, and neutrality in the treatment of individuals.

The parameters of personal autonomy reached a zenith in the case of *Goldberg* with the recognition of a new set of procedural rights vested in the individual person against administrative power.[264] As illustrated in the 1960s cases of *United Church of Christ* and *Scenic Hudson*, the federal courts employed a less deferential level of judicial review to insure the rights of participation by individual citizens to

261. 198 U.S. 45 (1905).
262. 298 U.S. 587 (1936).
263. 300 U.S. 379 (1937).
264. 397 U.S. 254, 260-66 (1970).

check agency decision making power.[265] The scope of personal autonomy that merits protection through constitutional rights was tested in several immigration cases as the century turned. In *Jean*, the Court imposed a deferential non-constitutional remedy on a group of Haitian refugees seeking asylum.[266] More recently, in *St. Cyr* and *Zadvydas*, the Court affirmed the significance of the judicial review of the habeas petitions of resident aliens on the ground that alternative statutory constructions would raise serious constitutional problems.[267]

As indicated throughout this article, it is, of course, possible to attribute various social, political and economic factors to explain the oscillation between suspicion and deference, and the degrees thereof, in the historical development of judicial review of administrative power. Notwithstanding such valid alternative explanations, this historical overview has focused on the significance of the constitutional issues of the separation of powers and subjective legal rights. The two constitutional issues are interrelated as they stem from values of the suspicion of government power and personal autonomy, which are embodied deep within classical political theory. The tension in liberal theory between suspicion and trust as well as that between autonomy and participation may account, at least in part, for the oscillation in the historical development of American judicial review of administrative power.

For as long as liberal theory, with its inherent tensions, serves as the philosophical foundation for constitutional government, the oscillation is likely to remain. The traditional model of administrative law, which envisaged judicial resolution of disputes between individuals and agency officials, will increasingly encounter a theory of judicial deference to agency expertise in implementing public policy through rule making. As regulatory governance continues to increase in significance, the historical development of American administrative law serves as a reminder that government based on liberal theory will need to include a healthy role for the judiciary. Judicial review of administrative action is simply too important for the protection of individual autonomy against government power to be forsaken.

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265. *See supra* text accompanying notes 160-76 (discussing closer scrutiny by the federal courts at agency decisions).

266. 472 U.S. 846, 857 (1985).

267. INS v. St. Cyr, 121 S. Ct. 2271 (2001); and Zadvydas v. Davis, 121 S. Ct. 2491 (2001).